82-2145

No.—

In the Supreme Court of the United States

OCTOBER TERM, 1982

DAVID L. HOLTON, CHIEF INVESTIGATOR, SELECT COMMITTEE ON AGING, U.S. HOUSE OF REPRESENTATIVES, ET AL., PETITIONERS

v.

GEORGE H. BENFORD, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

STANLEY M. BRAND,
General Counsel to the Clerk,
STEVEN R. ROSS,
Deputy Counsel to the Clerk,
U.S. House of Representatives,
H–105, The Capitol
Washington, D.C. 20515
(202) 225–7000
Attorneys for Congressional Petitioners.

Of Counsel:
EUGENE GRESSMAN
Special Counsel,
School of Law, University of North Carolina,
Chapel Hill, N.C. 27514 (919) 962–4120

QUESTION PRESENTED

Whether, in a suit for civil damages against congressional staff members, the denial "with prejudice" of the staff members' pretrial motion for summary judgment on their claim of qualified immunity under *Harlow* v. *Fitzgerald*, 102 S.Ct. 2727 (1982), is appealable as a collateral final order, 28 U.S.C. § 1291.*

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*Original parties before the United States Court of Appeals for the Fourth Circuit: (1) Mrs. Isaac (Betty) Hamburger, special senior citizen investigator for the House Select Committee on Aging, a petitioner herein; (2) Mrs. Lillian Teitelbaum, a special senior citizen investigator for the Select Committee, a petitioner herein, (3) David Holton, Chief Investigator for the House Select Committee on Aging at the time of the investigation, *Report of the Clerk of the House from October 1, 1978 to December 31, 1978*, H.R. Doc. No. 61, 96th Cong., 1st Sess. 170 (1979), now employed as chief investigator by the Special Committee on Aging of the United States Senate, *Report of the Secretary of the Senate from October 1, 1982 to March 31, 1983*, S.Doc.No. 6, 98th Cong., 1st Sess. 116 (1983), a petitioner herein; and Kathleen Gardner, a professional staff member of the Select Committee, *Report of the Clerk of the House, supra*. Defendants American Broadcasting Companies Inc., a New York Corporation, and Margaret Osmer-McQuade, an ABC employee, sought to intervene in the petitioners appeal or in the alternative to file an *amicus* brief. The Court of appeals denied the motion because it was rendered moot by dismissal of the appeal.

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In the Supreme Court of the United States

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No. —

DAVID L. HOLTON, CHIEF INVESTIGATOR, SELECT COMMITTEE ON AGING, U.S. HOUSE OF REPRESENTATIVES, ET AL., PETITIONERS

v.

GEORGE H. BENFORD, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners herein, four congressional staff members of the Select Committee on Aging of the United States House of Representatives ("congressional petitioners"), through the General Counsel to the Clerk of the House of Representatives, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on April 11, 1983.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is unpublished. It is reprinted at App. A, *infra*, pp. 1a–10a. The opinion of the United States District Court for the District of

Maryland is published at 554 F.Supp. 145. It is reprinted at App. B, *infra*, pp. 1b–25b.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on April 11, 1983, and is reprinted at App. A, *infra*, p. 11a. This petition is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Secton 1291, Title 28, United States Code, provides in pertinent part:

> The courts of appeals other than the United States Court of Appeals for the Federal Circuit shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * * except where a direct review may be had in the Supreme Court.

STATEMENT OF THE CASE

The facts relevant to the question here presented are largely procedural in nature and may be succinctly stated.

Respondent, an independent agent selling cancer insurance to senior citizens, filed this civil damage action in 1979 in the District Court for the District of Maryland. Named as defendants were (1) the American Broadcasting Companies, Inc. ("ABC"), and an employee thereof, and (2) the four petitioners herein, all of whom were staff members employed by the House of Representatives Select Committee on Aging. At the time in question, the Select Committee was investigating abuses in the sale of supplemental health insurance to the elderly. App. B, p. 2b.

As part of this investigation, the four petitioners, posing as sales trainees or potential purchasers of cancer insurance, arranged a sales meeting at which the respondent presented his standard cancer insurance promotion to the petitioners. Without respondent's knowledge or consent, the sales presentation was taped by ABC, and portions thereof were later broadcast

on the ABC Nightly News program. Having later learned that the petitioners were in fact employed as investigators for the Select Committee, the respondent brought this action for money damages, alleging that the broadcast caused him grave financial and other injury.

The respondent's complaint alleged that petitioners' conduct violated (1) the Maryland Wiretapping and Electronic Surveillance Act, Md.Cts. & Jud.Proc.Code Ann § 10–401 *et seq.*, (2) the Fourth Amendment,[1] (3) Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510 *et seq.*, and (4) the common law tort principles of civil conspiracy, malicious interference with business relations, and invasion of privacy. App. B, p. 2b.

A. The Speech and Debate Clause proceedings

In 1980, the petitioners moved to dismiss the complaint, or alternatively for summary judgment, on the claim that their actions were protected under either the Speech or Debate Clause of Article I or the common law doctrine of official or absolute immunity. The District Court declined to grant such relief, and the Fourth Circuit affirmed in an unpublished opinion. *Benford* v. *American Broadcasting Companies*, 502 F.Supp. 1148 (D. Md. 1980), *aff'd*, 661 F.2d 917 (4th Cir.) [table], *cert. denied sub nom. Holton* v. *Benford*, 454 U.S. 1060 (1981).

The District Court's opinion made clear the limited scope of the ruling: "neither the taping nor the subsequent broadcasting is absolutely protected by either the Speech or Debate Clause or the doctrine of official immunity." 502 F.Supp. at 1151. The opinion also made clear that petitioners' claim of qualified immunity "cannot be resolved at this stage in the proceedings," inasmuch as such a defense was available only if congressional petitioners "meet their burden of proving that they acted reasonably and in good faith." *Id.* And as the District Court reiterated in its opinion below on qualified immunity, App. B, p. 3b, the 1980 opinion on the Speech or Debate

[1] Respondent's Fourth Amendment claim, Count II of the complaint, was dismissed by the District Court in 1980 as to all parties. App. B, p. 4b.

Clause and offical immunity closed with the suggestion "that upon a proper showing, the congressional defendants would be entitled tc assert a defense of qualified immunity as defined by the Supreme Court in *Butz* v. *Economou*, 438 U.S. 478 (1978)." *See Benford* v. *American Broadcasting Companies*, 502 F.Supp. at 1159. But the opinion did not specify when or how such a showing could be made. What is clear is that a decision "as to the viability of the qualified immunity defense was not then reached." *Benford* v. *American Broadcasting Companies*, 554 F.Supp. at 147. App. B, p. 3b.

It must be emphasized that this 1980 "suggestion" by the court respecting the qualified immunity defense was rendered at a time when the defense had both objective and subjective components, and when many courts deemed that the subjective element could be shown only by proof at trial that the government official subjectively acted in good faith. But in June of 1982, this Court in *Harlow* v. *Fitzgerald*, 102 S.Ct. 2727 (1982), revised the necessary elements of the qualified immunity defense by eliminating the subjective aspect, leaving only the objective element to be proved by the government official. The objective aspect is measured not by subjective facts as to the official's intentions but by reference to "established statutory or constitutional rights of which a reasonable person would have known." 102 S.Ct. at 2738.

The Fourth Circuit, in affirming the District Court's denial of the motions to dismiss or for summary judgment on the Speech and Debate Clause and absolute immunity defenses, did not comment on the District Court's "suggestion" respecting the qualified immunity defense. But, as the Fourth Circuit acknowledges in its most recent opinion, on the earlier appeal the Fourth Circuit did address "the question of our jurisdiction over the seemingly interlocutory appeal of a denial of summary judgment." App. A, p. 3a. The court had there cited this Court's decision in *Helstoski* v. *Meanor*, 442 U.S. 500 (1979), for the proposition that the "denial of a dismissal motion based on the Speech or Debate Clause [and on absolute immunity] is an appealable final decision under the collateral

order doctrine." App. A, p. 3a. The court then proceeded to consider and affirm on the merits of those defenses.

After the affirmance, the case was remanded to the District Court for further proceedings.

B. The qualified immunity proceedings in the District Court

Shortly after the remand to the District Court, this Court decided *Harlow* v. *Fitgerald, supra.* Because of the alterations in qualified immunity test fashioned in *Harlow,* the District Court entertained further arguments from counsel as to the "possible impact" of *Harlow* and the companion decision in *Nixon* v. *Fitzgerald,* 102 S.Ct. 2690 (1982). *See* App. B. p. 4b. The court also stayed further discovery with respect to the congressional staff members pending that examination. Both the petitioners and the respondent filed extensive memoranda as to the impact of these decisions.

More particularly, these parties fully briefed the legal issues stemming from the objective standard articulated in *Harlow, i.e.,* whether a reasonable person should have known that the taping and broadcasting violated clearly established rights under Maryland and federal statutes. The petitioners also made additonal factual submissions concerning authorization for their actions with respect to the taping and broadcasting. All these contentions were made in the context of petitioners' renewal of their earlier summary judgment motion, which had been denied only with respect to the other immunity defenses.

After nearly six months of consideration, the District Court on December 22, 1982, ordered that petitioners' motion "for summary judgment on the basis of qualified immunity BE, and the same hereby IS, DENIED, with prejudice." App. B, p. 26b. The order also lifted the stay "effecting discovery in this case." *Id.* In its accompanying opinion, the District Court made the following definitive rulings:

(1) The respondent's statutorily protected rights under the Maryland Wiretapping and Electronic Surveillance Act were clearly established, and a reasonable person should have been aware of those rights. Therefore, the petitioners were found

not to have satisfied the objective good faith test as outlined in *Harlow. Benford* v. *American Broadcasting Companies*, 554 F.Supp. at 149–153, App. B, pp. 10b–13b.

(2) Title III of the Omnibus Crime Control and Safe Streets Act is not vague and thus comports with the "clearly established" objective standard of *Harlow*. Thus, petitioners' request for qualified immunity as to this alleged statutory violation "will therefore be denied." *Id.* 554 F. Supp. at 154. App. B, pp. 16b–20b.

(3) As to the common law tort actions, the District Court agreed with petitioners that common law torts do not come within the *Harlow* objective standard of determining whether "clearly established statutory or constitutional rights" would have been known by a reasonable person, charged with violating such rights. App. B, pp. 13b–16b. But the court then examined the scope of the authority exercised by petitioners as investigators for the Select Committee, on the theory that if they did act within the scope of their authority their summary judgment motion against respondent's common law counts would be granted under *Butz* v. *Economou*, 438 U.S. 478 (1978), and *Barr* v. *Matteo*, 360 U.S. 564 (1958). After its examination, the court concluded that the broadcasting of the respondent's sales meeting was not shown to be "legitimately authorized by Congress" or to be "part of the deliberative or legislative process," and thus the congressional staff members "acted beyond their scope of authority in its making." *Id.*, 554 F. Supp. at 156. App. B, pp. 20b–24b.

The court's opinion concluded by stating that the petitioners' "request for summary judgment based on qualified immunity is denied, without prejudice to the remaining grounds for dismissal and/or summary judgment which have been alleged and which have not yet been decided." 554 F. Supp. at 156. App. B, p. 25b. At no point in the opinion did the court indicate that petitioners are free to prove other facts at trial that might entitle them to the qualified immunity defense. Yet

it is this "with prejudice" order that the Fourth Circuit found to be interlocutory and hence nonappealable.

C. The qualified immunity appeal in the Fourth Circuit

The petitioners duly filed a notice of appeal to the Fourth Circuit from the "with prejudice" order denying summary judgment "on the basis of qualified immunity." The respondent countered with a short motion to dismiss the appeal for want of jurisdiction, asserting that an appeal from the denial of a motion for summary judgment is interlocutory and therefore unappealable. The Fourth Circuit granted this motion to dismiss the appeal, having dispensed with oral argument but having received petitioners' short brief in opposition to the motion to dismiss. Ths action was taken in the form of a *per curiam* opinion, marked "UNPUBLISHED," dated April 11, 1983. It is that opinion, and the accompanying judgment, to which the requested writ of certiorari runs. *See* App. A, p. 11a.

The Fourth Circuit's opinion is premised upon the following propositions:

(1) The Fourth Circuit, after summarizing the collateral order doctrine epitomized by *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541 (1949), concluded that the "with prejudice" denial of summary judgment on the qualified immunity defense was not a final or appealable order within the meaning of that doctrine. Thus the appeal was dismissed for want of jurisdiction. No attempt was made to review or discuss any of the legal rulings of the District Court, although at one point the Fourth Circuit did "not deny that the freedom of congressional workers to tape and broadcast their investigative work presents a serious legal issue." App. A, p. 7a.

(2) The Fourth Circuit's rationale for treating the dismissal order as nonfinal appears to be the notion that "the district court left open the possibility that they [the congressional petitioners] could prove certain facts at trial which would entitle them to qualified immunity." App. A, p. 6a. Without reference to any such reservation in the District Court's opinion, the Fourth Circuit speculated that the petitioners "may

show extraordinary circumstances and that they neither knew nor should have known of the relevant laws"; and the court further opined that the petitioners "may show that a member of Congress or staff member of the Select Committee possessed the power to arrange or authorize the taping and public broadcasting and that the [petitioners] were directly authorized by this person to do the same." *Id.* Accordingly, said the court, the qualified immunity defense is "far from finally determined." *Id.*

(3) The Fourth Circuit stated that, by this ruling, "we follow the Supreme Court's lead [in the *Harlow* case] where, after enunciating its new qualified immunity standard, it remanded to the district court for consideration of factual issues with which the district court was more familiar." App. A, p. 7a.

(4) The Fourth Circuit acknowledged that "our refusal to take jurisdiction of this appeal conflicts with the D.C. Circuit's recent holding in *McSurely* v. *McClellan*, 697 F.2d 309, 315–16 (D.C. Cir. 1982)." App. A, p. 7a. That conceded conflict renders inappropriate the Fourth Circuit's determination not to publish its opinion in this case, for under the court's own rules an opinion is to be published if it "creates a conflict with a decision in another circuit." [2]

(5) Finally, the Fourth Circuit placed its own interpretative gloss on the *Harlow* decision: "We do not think that the Supreme Court intended that every civil defendant with some tie to government could impede the progress of litigation against him by claiming this or that immunity and then immediately appealing each separate denial." App. A, p. 9a. The court added that this Court "could not have meant that there be an immediate appeal even when the disappointed movants can still present facts at trial in support of their immunity defense. Since they can appeal upon final judgment, there is no right irretrievably lost to them by this decision." *Id.*

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[2] Rule 18(a)(v) of the Rules of the United States Court of Appeals for the Fourth Circuit (1982).

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW NEGATES THE PRINCIPLES AND PROCEDURES ESTABLISHED BY THIS COURT FOR THE PROPER RESOLUTION OF QUALIFIED IMMUNITY CLAIMS

In light of the controlling decisions of this Court, the opinion of the Fourth Circuit creates a conflicting and dangerous precedent. And by subjecting government officials to the trial of damage claims against them, at a point where their entitlement to defend on qualified immunity grounds has not been finally determined, the opinion serves to "undermine the effectiveness of Government as contemplated by our constitutional structure." *Harlow* v. *Fitzgerald*, 102 S. Ct. 2727, 2739 n. 35 (1982).[3]

In the Fourth Circuit's view, a "with prejudice" denial of a pretrial motion for summary judgment on a qualified immunity claim is an interlocutory and nonappealable order. Thus governmental defendants, like the petitioners herein, are forced to trial on damage claims against them without any chance either (1) to relitigate or present their qualified immunity defense before trial, or (2) to obtain a definitive appellate test, before trial, of the viability of that defense. Ironically, these procedural barriers relate to a defense that, like the Speech or Debate Clause defense, was designed to protect government of ials "not only from the consequences of litigation's results but also from the burden of defending themselves." *Helstoski* v. *Meanor*, 442 U.S. 500, 508 (1979), *quoting Dombrowski* v. *Eastland*, 387 U.S. 82, 85 (1967).

Consider, then, the conflicts and problems created by this Fourth Circuit ruling:

(1) The decision, by limiting pretrial immunity claims to trial court determination, conflicts with this Court's repeated preference for finally resolving qualified immunity problems

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[3] *Harlow* observed that this Court's decisions "consistently have held that government officials are entitled to some form of immunity for damages . . . [in order] to shield them from undue interference with their duties and from potentially disabling threats of liability." 102 S.Ct. at 2732.

before trial. While immunity claims can be decided "either by way of summary judgment or by trial on the merits," *Scheuer* v. *Rhodes*, 416 U.S. 232, 250 (1974), this Court has admonished that insubstantial damage suits against government officials "need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense . . . and firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits." *Butz* v. *Economou*, 438 U.S. 478, 508 (1978).[4] Furthermore, in the context of an appeal from the denial of a pretrial summary judgment motion raising the qualified immunity defense, *Harlow* v. *Fitzgerald* "mandates an application of the qualified immunity standard that would permit the defeat of insubstantial claims *without resort to trial*." 102 S.Ct. at 2736 (emphasis added).

Thus, if summary judgment is to serve its special purpose of protecting governmental defendants from having to defend themselves at trial against frivolous damage claims, an arguably erroneous denial of summary judgment at the pretrial stage must be deemed appealable as a final collateral order. The Fourth Circuit's decision simply frustrates that purpose and destroys the usefulness of the qualified immunity defense.

(2) The Fourth Circuit's decision also does violence to the collateral order doctrine established in *Cohen* v. *Beneficial Loan Corp.*, 339 U.S. 541 (1949). It does so in three ways: (a) by ignoring the finality implicit in the "with prejudice" language in the District Court's denial order; (b) by substituting the Fourth Circuit's own speculation as to the possibility of further factual development at trial of the immunity defense; and (c) by then applying the normal rules respecting nonfinal judgments and piecemeal appeals.

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[4] This Court's *Harlow* opinion reiterates the *Butz* admonition, adding that insubstantial lawsuits "undermine the effectiveness of Government as contemplated by our constitutional structure and 'firm application of the Federal Rules of Civil Procedure' is fully warranted in such cases." 102 S.Ct. at 2739 n.35.

It is true that an ordinary pretrial denial of summary judgment is nonappealable. But a pretrial denial of summary judgment on the issue of qualified immunity must be viewed in light of the critical policy and constitutional purposes served by the qualified immunity defense. Such indeed is the sense of the *Harlow* case, where "petitioners invoked the collateral order doctrine and appealed the denial of their immunity defense [presented in the form of a summary judgment motion] to the Court of Appeals for the District of Columbia Circuit." 102 S.Ct. at 2732. And the Court there announced that "we took jurisdiction of the case only to resolve the immunity question under the collateral order doctrine." *Id.*, at 2740 n. 36. This Court must have intended, therefore, to carve out a qualified immunity exception to the prohibition against piecemeal appeals by labeling such a denial a collateral final order. Certiorari should be granted to make that exception crystal clear.

The Fourth Circuit itself recognized in the earlier appeal in this case from the denial of motions to dismiss and for summary judgment respecting the speech/debate and absolute immunity defenses that such a denial was final and appealable. In its earlier opinion, the Fourth Circuit relied upon *Helstoski* v. *Meanor, supra,* which was said to mean that "denial of a dismissal motion based on the Speech and Debate Clause [and on absolute immunity] is an appealable final decision under the collateral order doctrine." *See* App. A, p. 3a. Why should not the same conclusion follow where the qualified immunity defense is involved?

(3) In ordering a remand for trial in which further factual development of the qualified immunity defense might occur, the Fourth Circuit purported to "follow the Supreme Court's lead" in *Harlow* v. *Fitzgerald, supra.* But in *Harlow,* this Court remanded the case to the district court not to permit further development of immunity facts at trial, but to reassess the pretrial denial of summary judgment in light of the revised qualified immunity standard announced by the Court. Specifically, the remand was designed to determine if the plaintiff's "pre-trial showings were insufficient to survive [the govern-

ment officials'] motion for summary judgment." 102 S.Ct. at 2739. In no way can *Harlow* be deemed a precedent for authorizing or even approving the trial on the damage claims as the proper time and place for developing further facts to justify the qualified immunity defense. The Fourth Circuit's misreading of the *Harlow* remand should be corrected by this Court.[5]

(4) By dismissing this appeal from the "with prejudice" denial for want of appellate jurisdiction, the Fourth Circuit has unleashed an intrusive pretrial inquiry into the files and deliberative processes of the House of Representatives and its Select Committee on Aging. The respondent in this case has made wide-ranging demands to see not only all documents related to the taping and broadcasting incident in the possession of the Clerk of the House, the official custodian of all the documents and files of the House and its various committees, but also the investigative records of the Select Committee. On April 28, 1983, the House responded by enacting House Res. 176, which "ordered and directed [the Clerk] not to produce for inspection and copying by [respondent] or any of his representatives, or to the court for inspection, any of the investigative records of the select committee sought by the subpena." 129 Cong. Rec. H2450–2457 (daily ed. Apr. 28, 1983).

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[5] In *Harlow*, the Court described what the district judge can determine on this kind of a pretrial summary judgment motion: "On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred * * *. Until this threshold immunity question is resolved, the discovery should not be allowed. If the law was clearly established, the immunity defense ordinarily should fail * * * [but] if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors." 102 S.Ct. at 2739.

Such is precisely the role that the District Court played in this case. The refusal to allow petitioners to avail themselves of the *Harlow*-type immunity defense bears all the earmarks of a final collateral order.

On Friday, June 24, 1983, pursuant to a show cause order entered upon *ex parte* application of the respondent, the District Court adjudged the Clerk of the United States House of Representatives in contempt and imposed a $500 a day fine for every day he remains in noncompliance, based on the Clerk's obedience to House Resolution 176.[6]

But *Harlow* sounds a theme that runs through this Court's immunity decisions—suits against government officials and intrusive inquiry into the deliberative processes of the legislative branch resulting from broad-ranging discovery "implicate separation of powers concerns." 102 S.Ct. at 2738 nn. 28, 29. For that reason, "[u]ntil this threshold immunity question is resolved, discovery should not be allowed." *Id.*, at 2739. *Harlow* would appear to mean that discovery must stop until the claimed immunity defense has been finally resolved through the appellate process, if necessary. But whatever the Court's intentions in this regard, the matter needs clarification through the grant of certiorari.

The Fourth Circuit's dismissal of the appeal guarantees that discovery will recommence the moment a district court denies a pretrial effort to assert qualified immunity. That result seems patently offensive to the principles and procedures underlying the qualified immunity defense, as articulated in *Harlow*.

II. THE DECISION BELOW, PRECLUDING APPELLATE REVIEW OF A DENIAL OF AN EFFORT TO ASSERT THE QUALIFIED IMMUNITY DEFENSE, CONFLICTS WITH THE MCSURELY RULING OF THE DISTRICT OF COLUMBIA CIRCUIT

The Fourth Circuit candidly acknowledged that "our refusal to take jurisdiction of this appeal conflicts with the D.C. Cir-

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[6] The imposition of the fine has been stayed until July 8, 1983 and for any time during which "a duly filed motion is under consideration or an appeal remains undecided, or the contempt is lifted by virture of the Clerk's having purged himself of this contempt." *Benford* v. *American Broadcasting Companies*, Civil Action No. N-79-2386 (D.Md., June 24, 1983).

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cuit's recent holding in *McSurely* v. *McClellan*, 697 F.2d 309, 315–16 (D.C. Cir. 1982)." App. A, p. 7a. Indeed, there is such a conflict. And it serves to augment the appropriateness of granting certiorari to resolve the differences between the Circuits. It so happens that the District of Columbia Circuit and the Fourth Circuit have jurisdiction over the two geographic areas containing the heaviest concentration of government officials in the nation. Given the proliferation of damage suits against government officials, the inconsistent administration of the qualified immunity defense becomes intolerable. The conflict must be resolved by this Court.

In *McSurely*, the District of Columbia Circuit was faced with the same kind of problem present in the instant case, *i.e.*, the problem of appellate jurisdiction to review the pretrial denial of a summary judgment motion, based on the qualified immunity defense, filed by a state official sued for monetary damages. The court acknowledged that, ordinarily, a denial of a motion for summary judgment is not a final decision within the meaning of 28 U.S.C. § 1291 and thus is not reviewable.[7] Like the Fourth Circuit, the District of Columbia Circuit had a record of treating pretrial motions based on absolute immunity as "immediately appealable under the collateral order doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949)." 697 F.2d at 315–16.

Turning to what it called the "harder question [of] whether a denial of qualified immunity is also immediately reviewable," the *McSurely* court found such a denial appealable at the pretrial stage largely in reliance on this Court's decision in *Harlow*. In *Harlow*, said the District of Columbia Circuit, this Court "consciously sought to facilitate summary disposition of insubstantial claims against governmental officials." *McSurely*

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[7] For this obvious proposition, the court cited its own holding in *McSurely* v. *McClellan*, 521 F.2d 1024, 1031 (D.C.Cir. 1975), *aff'd in pertinent part en banc*, 553 F.2d 1277 (1976), *cert. dismissed*, 438 U.S. 189 (1978), and made a general citation to 10 C. Wright & A. Miller, *Federal Practice and Procedure:* Civil § 2715 (1976).

v. *McClellan*, 697 F.2d at 316. From which the court concluded "that appellate review of a denial of a motion for summary disposition must be available to ensure that government officials are fully protected against unnecessary trials under qualified immunity on the same basis as for absolute immunity." *Id.*

The District of Columbia decision in *McSurely* underscores the importance of the issue in the instant case, as well as the quite different reading of *Harlow* than that given by the Fourth Circuit. *Harlow* thus is at the center of the conflict between these two Circuits, making it all the more appropriate to resolve this conflict over the interpretation to be given an opinion of this Court.

CONCLUSION

For these various reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit in this proceeding.

Respectfully submitted,

STANLEY M. BRAND,
General Counsel to the Clerk,
STEVEN R. ROSS,
Deputy Counsel to the Clerk,
U.S. House of Representatives.
H-105, The Capitol
Washington, D.C. 20515
(202) 225-7000
Attorneys for Congressional Petitioners.

Of Counsel:
EUGENE GRESSMAN
University of North Carolina, School of Law,
Chapel Hill, North Carolina 27514.

July 1, 1983

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 83-1168

George H. Benford,

Appellee,

v.

American Broadcasting Companies, Inc., a New York Corporation and Margaret Osmer,

Defendants,

and

Mrs. Isaac (Betty) Hamburger and Miss Kathleen T. Gardner and Mrs. Lillian M. Teitelbaum and David L. Holton,

Appellants.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Edward S. Northrop, District Judge.

Submitted: March 18, 1983 Decided: April 11, 1983

Before HALL and MURNAGHAN, Circuit Judges, HAYNSWORTH, Senior Circuit Judge.

(Michael L. Murray, Stanley M. Brand, and Steven R. Ross for the Appellants. Dean Sharp and Wilson K. Barnes for the Appellee.)

PER CURIAM:

George H. Benford, an independent agent selling cancer insurance policies, filed suit against four staff members employed by the Select Committee on Aging of the United States House of Representatives (the "congressional defendants"), the American Broadcasting Companies, and an ABC employee. The complaint alleges that one congressional defendant, during a Committee investigation of abuses in the sale of insurance to the elderly, infiltrated Benford's business as a trainee and caused him to deliver his standard cancer insurance promotion to two elderly ladies and their male friend, all congressional defendants.[1] ABC surreptitiously filmed the presentation and broadcast portions of it on the ABC Nightly News. Benford then filed this action seeking damages and asserting that the defendants' conduct was unconstitutional, violative of state and federal wiretapping statutes, and tortious.

The congressional defendants appeal from the denial of their summary judgment motion in which they asserted their entitlement to qualified immunity for their actions. Benford v. American Broadcasting Companies, Inc., C/A No. N-79-2386 (D. Md., Dec. 22, 1982). Benford has moved to dismiss the appeal as interlocutory. See 28 U.S.C. § 1291. For the following reasons, we agree with Benford and dismiss the appeal.

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1 The congressional defendants hold varying degrees of job status with the Committee. One is a Chief Investigator, another a professional staff member, and the remaining two are "special senior citizen investigators."

This is the second pre-trial appeal sought by the congressional defendants. In 1980 they moved for summary judgment, arguing that their actions were protected under either the Constitution's Speech or Debate Clause or the common law doctrine of official immunity. In concluding that these defendants were neither covered under the Speech or Debate Clause nor entitled to absolute immunity, the district court recognized that they would be entitled to assert a qualified immunity defense at trial. Benford v. American Broadcasting Companies, Inc., 502 F. Supp. 1148, 1151-59 (D. Md. 1980), aff'd, 661 F.2d 917 (4th Cir.) [table], cert. denied, 454 U.S. 1060 (1981).

In affirming the judgment upon this first appeal, we necessarily addressed the question of our jurisdiction over the seemingly interlocutory appeal of a denial of summary judgment. Benford v. Hamburger, No. 81-1200 (4th Cir., June 17, 1981) (unpublished), cert. denied, 454 U.S. 1060 (1981). We cited Helstoski v. Meanor, 442 U.S. 500 (1979), for the proposition that the "denial of a dismissal motion based on the Speech or Debate Clause is an appealable final decision under the collateral order doctrine." No. 81-1200, supra, slip op. at 3. Our inquiry into the denial of absolute immunity was only "an incidental exercise" of our power to decide the Speech or Debate issue. Id.

Shortly after the case was remanded to the district court, the Supreme Court decided Harlow v. Fitzgerald, ____ U.S. ____, 50 U.S.L.W. 4815 (June 24, 1982). In its Harlow decision,

the Court revised its standard for entitlement to qualified immunity, facilitating the disposition of this defense by trial courts on summary judgment motions. Id. at 4820. The district court accordingly undertook to decide the merits of this defense, as applied to the congressional defendants' actions, and issued its opinion in favor of Benford. It is this order of which these defendants seek immediate review.

Finality, as a condition to appellate review, was written into the first Judiciary Act "and has been departed from only when observance of it would practically defeat the right to any review at all." Cobbledick v. United States, 309 U.S. 323, 324 (1940), citing §§ 21, 22, 25 of the Act of September 24, 1789, 1 Stat. 73, 83-85. This congressional policy, currently embodied at 28 U.S.C. § 1291, has the rationale of

> forbidding [the] piecemeal disposition on appeal of what for practical purposes is a single controversy . . . [through] the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment.

Cobbledick, supra, at 325; accord, Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 373-74 (1981); Coopers & Lybrand v. Livesay, 437 U.S. 463, 467 n.8 (1978); United States v. MacDonald, 435 U.S. 850, 853 (1978). In the few instances where it has departed from this general prohibition, the Supreme Court has relied on the "collateral order" exception articulated in Cohen v. Beneficial

Industrial Loan Corp., 337 U.S. 541, 545-47 (1949).[2]

At issue in Cohen was a series of statutes, passed in the 1940s by many eastern states, requiring small shareholder plaintiffs who brought derivative actions to post security for expenses to be incurred by defendants in the litigation. The defendants took an immediate appeal from a pre-trial order denying their motion for security. The Court held that a "small class" of interlocutory district court decisions are immediately appealable since they (1) finally determine claims of right separable from and collateral to rights asserted in the action, (2) are too important to be denied review, and (3) are too independent of the cause itself to require the deferment of appellate consideration. Cohen, supra, at 546. This "small class" of cases was to consist only of those presenting a "serious and unsettled question," id. at 547, emphasizing this last requirement: "If the right [to security] were admitted or clear and the order involved only an exercise of discretion as to the amount . . ., appealability would present a different question." Id.

An analysis of the order appealed from by the congressional defendants leads us to the conclusion that we lack jurisdiction to decide the questions it presents. In its memorandum accompanying that order, the district court correctly stated that

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2 In addition to this judge-made exception, Congress has provided a right to interlocutory appeal under certain specified circumstances. See 28 U.S.C. § 1292.

"government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Benford v. American Broadcasting Companies, Inc., C/A No. N-79-2386 (D. Md., Dec. 22, 1982), slip op. at 7-8, quoting Harlow, supra. The court examined each potential statutory source of the defendants' liability and demonstrated that, in its estimation, a reasonable person pursuing the defendants' activities would have known that he or she was violating clearly established rights. With respect to the claims sounding in common law tort, the district court confined its analysis to whether the congressional defendants were qualifiedly immune because they acted "within the scope of their authority." Benford, supra, slip op. at 20-24.

In deciding against these defendants on both issues, the district court left open the possibility that they could prove certain facts at trial which would entitle them to qualified immunity. As to the violations of clearly established statutory rights, the defendants may show extraordinary circumstances and that they neither knew nor should have known of the relevant laws. Harlow, supra. With respect to the common-law tort claims, the defendants may show that a member of Congress or staff member of the Select Committee possessed the power to arrange or authorize the taping and public broadcasting and that

the defendants were directly authorized by this person to do the same.

The qualified immunity defense is therefore far from finally determined. "Appeal gives the upper court a power of review, not one of intervention. So long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal." Cohen, supra, at 546; see also Coopers & Lybrand, supra, at 467-69. Most importantly, although we do not deny that the freedom of congressional workers to tape and broadcast their investigative work presents a serious legal issue, the degree of these workers' immunity is by no means an "unsettled question." Cohen, supra, at 547. By this ruling we follow the Supreme Court's lead where, after enunciating its new qualified immunity standard, it remanded to the district court for consideration of factual issues with which the district court was more familiar. Harlow, supra, at 4820-21.

We realize that our refusal to take jurisdiction of this appeal conflicts with the D.C. Circuit's recent holding in McSurely v. McClellan, 697 F.2d 309, 315-16 (D.C. Cir. 1982). That court opined that, prior to the Supreme Court's Harlow decision, there was reason to distinguish between the appealability of a summary denial of absolute immunity and one of qualified immunity. See also Forsyth v. Kleindienst, 599 F.2d 1203, 1207-09 (3d Cir. 1979), cert. denied, 453 U.S. 912 (1981). While absolute immunity was entirely a question of law and so was determined

by judges, e.g., Nixon v. Fitzgerald, ___ U.S. ___, 50 U.S.L.W. 4797 (June 24, 1982), qualified immunity involved a factual determination of subjective "good faith" which had to go to the jury. See Harlow, supra, at 4819-20. The Supreme Court jettisoned this factual aspect of the defense in order to facilitate the defeat of insubstantial claims on summary judgment without resort to trial. Id. The D.C. Circuit, since it has held orders denying absolute immunity immediately appealable under the Cohen doctrine, decided that Harlow now mandates a similar application of that doctrine to qualified immunity. McSurely, supra.

We do not agree that the summary denial of either kind of immunity is always an immediately appealable order. In its Cohen analysis with respect to the appealability of an order denying absolute immunity to former President Nixon, the Supreme Court again stressed that it, and formerly the court of appeals, had jurisdiction over the appeal only because it raised a "serious and unsettled question." Nixon, supra, at 4800.[3] In Harlow, the Court took jurisdiction for these same reasons, Harlow, supra, at 4817 n.11, decided the new standard for qualified immunity, and then remanded to the district court for specific application of the standard.

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3 The Supreme Court's jurisdiction was invoked under 28 U.S.C. § 1254, a statute investing it with authority to review "[c]ases in" the courts of appeals. The court of appeals' jurisdiction, however, depended on the application of 28 U.S.C. § 1291, since the Supreme Court based its analysis of appealability in the court of appeals on the Cohen exception to the finality requirement. Nixon, supra.

The Supreme Court has twice held that orders denying claims of absolute immunity are appealable under the Cohen doctrine. The "common thread" running through these decisions, however, is "a constitutional right, protected by an express constitutional provision." Forsyth v. Kleindienst, ____ F.2d ____, No. 82-1812 (3d Cir., Jan. 20, 1983), slip op. at 8 (Sloviter, J., dissenting). In Abney v. United States, 431 U.S. 651 (1977), and in Helstoski, supra, the Court held that pre-trial orders involving, respectively, claims of double jeopardy and the Speech or Debate Clause are "final decisions" under 28 U.S.C. § 1291. The Court stressed that these criminal defendants each contested "the very authority of the Government to hale him into court to face trial on the charge against him." Helstoski, supra, at 507, quoting Abney, supra, at 659.

These cases, then, are exceptions to the Cohen requirement of an "unsettled" question. We do not think that the Supreme Court intended that every civil defendant with some tie to government could impede the progress of litigation against him by claiming this or that immunity and then immediately appealing each separate denial. And if the Court did have this intention, it could not have meant that there be an immediate appeal even when the disappointed movants can still present facts at trial in support of their immunity defense. Since they can appeal upon final judgment, there is no right irretrievably lost to them by this decision.

Accordingly, we grant Benford's motion, dismiss the appeal, and remand the case for further proceedings in the district court.[4] We dispense with oral argument, since the facts and legal arguments are adequately presented in the briefs and record.

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4 American Broadcasting Companies, Inc., and its employee have moved for leave to intervene in their co-defendants' appeal or, in the alternative, to file an amicus curiae brief. This opinion renders their motion moot and it is therefore denied.

JUDGMENT

United States Court of Appeals

for the

Fourth Circuit

No. 83-1168

GEORGE H. BENFORD,

Appellee,

vs.

American Broadcasting Companies, Inc., a New York Corporation and Margaret Osmer,

Defendants,

and

MRS. ISAAC (BETTY) HAMBURGER and MISS KATHLEEN T. GARDNER and MRS. LILLIAN M. TEITELBAUM and DAVID L. HOLTON,

Appellants.

Appeal from the United States District Court for the ----- *District of* Maryland

This cause came on to be heard on the record from the United States District Court for the ----- *District of* Maryland

~~and was argued by counsel~~

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, dismissed. The case is remanded to the United States District Court for the District of Maryland for further proceedings consistent with the opinion of this court filed herewith.

William K. Slate II

CLERK

FILED

APR 11 1983

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

GEORGE H. BENFORD :

v. : CIVIL ACTION NO. N-79-2386

AMERICAN BROADCASTING COMPANIES, INC., and Mrs. Isaac (Betty) Hamburger and Miss Kathleen T. Gardner and Mrs. Lilliam M. Teitelbaum and David L. Holton and Margaret Osmer :

Northrop, Senior Judge

Filed: December 22, 1982

Wilson K. Barnes, and Little, Hall & Steinmann, P.A., of Baltimore, Maryland, and Dean E. Sharp, of Washington, D. C., for plaintiffs.

Alan I. Baron, of Baltimore, Maryland., and Ellen Scalettar, and Finley, Kumble, Wagner, Heine, Underberg and Casey, of Washington, D. C., for defendants American Broadcasting Co., Inc. and Margaret Osmer.

Stanley M. Brand, Steven R. Ross and Michael L. Murray, Office of the Clerk, United States House of Representatives, of Washington, D. C. for defendants Miss Kathleen T. Gardner, Mrs. Lilliam M. Teitelbaum, David L. Holton and Mrs. Isaac (Betty) Hamburger.

Northrop, Senior Judge

MEMORANDUM

Plaintiff, George H. Benford, instituted the present action against American Broadcasting Companies, Inc., (ABC), Margaret Osmer,* an ABC employee, David L. Holton, Chief Investigator for the Select Committee on Aging, United States House of Representatives (Select Committee), Kathleen T. Gardner, professional staff member of the Select Committee, and Betty Hamburger and Lillian M. Teitelbaum, both special senior citizen investigators of the Select Committee. Defendants Holton, Gardner, Hamburger, and Teitelbaum will hereinafter be referred to collectively as the "congressional defendants".** As the complaint is the same as that outlined in detail in Benford v. American Broadcasting Companies, Inc., 502 F.Supp. 1148 (D. Md. 1980), the facts need not be repeated exhaustively here.

Briefly, the plaintiff is an insurance salesman who was surreptitiously filmed by ABC while making his standard cancer insurance sales presentation to the congressional defendants, who were posing as prospective purchasers. Portions of that taped meeting were broadcast on the ABC Nightly News, and are alleged to have caused the plaintiff grave financial and other injury. The plaintiff claimed the taping and broadcasting

* Currently Margaret Osmer-McQuade.
** On information and belief, the plaintiff represents to this Court that of these congressional defendants, only defendant Holton continues to regularly perform Congressional/public duties.

subjects the defendants to liability under the Maryland Wiretapping and Electronic Surveillance Act, Md. Cts. & Jud. Proc. Code Ann. §§ 10-401, et seq., (hereinafter sometimes referred to as "The Maryland Act"), the Fourth Amendment of the Constitution, Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510, et seq., (hereinafter sometimes referred to as the "Federal Eavesdropping Statute"), and the common law torts of civil conspiracy, malicious interference with business relations, and invasion of privacy.

The congressional defendants responded to these charges by filing a motion to dismiss, or alternatively for summary judgment, as to each cause of action. Their primary contentions were that their conduct was absolutely protected by the Speech or Debate Clause of the Constitution, Art. I. § 6, cl. 1, and/or the common law doctrine of official immunity. This Court considered those arguments and, on November 14, 1980, held that the congressional defendants are not absolutely immune under either the Speech or Debate Clause or the official immunity doctrine, but suggested that upon a proper showing, the congressional defendants would be entitled to assert a defense of qualified immunity as defined by the Supreme Court in Butz v. Economou, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed. 2d 895 (1978). Benford v. American Broadcasting Companies, Inc., 102 F.Supp. 1148, 1159 (D.Md. 1980). A decision as to the viability of the qualified immunity defense was not then reached.

Defendants ABC and Osmer then filed motions to dismiss Counts II and IV of plaintiff's amended complaint. Count II alleged defendants violated plaintiff's Fourth Amendment rights

by conducting an unconstitutional search and seizure. Count IV charged the defendants with violating the Federal Eavesdropping Statute. This Court agreed with the defendants ABC and Osmer as to the non-viability of Count II and on November 24, 1980, it was dismissed. Because a genuine issue of material fact remained which would impact on the viability of Count IV, this Court refused to dismiss that count. Benford v. American Broadcasting Companies, Inc., 502 F.Supp. 1159 (D.Md. 1980). On January 14, 1981, in response to the congressional defendants renewed motion to dismiss, filed November 25, 1980, this Court dismissed Count II of plaintiff's complaint as it applied to the congressional defendants as well.

On July 16, 1982, this Court entered an order staying further discovery in this case with respect to the congressional defendants, pending the Court's consideration of the possible impact of Nixon v. Fitzgerald, 102 S.Ct. 2690 (1982), and Harlow v. Fitzgerald, 102 S.Ct. 2727 (1982), on the qualified immunity issue. Written discovery not involving the congressional defendants was not affected by the stay. The parties have since filed exhaustive memoranda outlining their respective positions.

Predictably, the plaintiff and the congressional defendants view Harlow from different perspectives. The congressional defendants argue that as a result of these decisions, they are now entitled to summary judgment for all remaining counts on the basis of qualified immunity. The plaintiff, on

the other hand, contends defendants have failed to meet even the threshhold requirements necessary to bring Harlow into play. Furthermore, even assuming the congressional defendants met their threshhold burden, the plaintiff argues the congressional defendants are nevertheless not entitled to qualified immunity as they have not satisfied the Harlow standards. As a result, the plaintiff asks this Court to reject the congressional defendants' renewed claim that they are entitled to summary judgment. The Court will herein decide this narrow, but important question.

I.

Harlow v. Fitzgerald

In Harlow, the petitioners, Bryce Harlow and Alexander Butterfield, were charged with participating in a conspiracy to violate the constitutional and statutory rights of the respondent, A. Ernest Fitzgerald. The petitioners were aides to former President Richard M. Nixon and were alleged to have arranged for the retaliatory firing of Fitzgerald, a "whistleblower". Fitzgerald was intent on exposing shoddy purchasing practices in the Department of Defense which resulted in cost overruns and which were politically embarrassing to the Nixon administration. The petitioners moved for summary judgment and contended they were entitled to absolute and qualified official immunity as aides to the President.

In reviewing the petitioners' claim of absolute official immunity, the Supreme Court reaffirmed the established principle that government officials are entitled to absolute immunity

when their special functions or constitutional status requires complete protection from suit. To hold otherwise would be to risk undue interference with their important public duties. The doctrine was not available, however, to aides to the President, either directly or in derivative fashion. Relying on Butz v. Economou, supra, where the Court earlier held that as a general rule absolute immunity does not protect Cabinet officers, the Harlow Court said it would be "untenable to hold absolute immunity an incident of the office of every Presidential subordinate based in the White House". Harlow v. Fitzgerald, 102 S.Ct. at 2734. Nevertheless, absolute immunity may still be claimed by legislators in their legislative functions, judges in their judicial functions, prosecutors in their prosecutorial functions, executive officers in their adjudicative functions, and by the President of the United States. Harlow v. Fitzgerald, 102 S. Ct. at 2733. See also: Eastland v. United States Servicemen's Fund, 421 U.S. 491, 95 S.Ct. 1813, 44 L.Ed. 2d 324 (1975); Stump v.Sparkman, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed. 2d 331 (1978); Butz v. Economou, supra, Nixon v. Fitzgerald, supra.

Correspondingly, under Harlow, the defense of qualified immunity remains available to public officials, absent special circumstances. To raise this defense, an official must show (1) his actions were taken "reasonably and in good faith",

and (2) that his conduct was authorized. 1/

Prior to Harlow, the component parts of the "good faith" standard were identified as being comprised of both objective and subjective elements. The objective element concerned presumptive knowledge of and respect for 'basic, unquestioned constitutional rights', and the subjective element referred to 'permissible intentions'. Id. at 2737; See Wood v. Strickland, 420 U.S. 308, 320, 95 S.Ct. 992, 999, 43 L.Ed. 2d 214 (1975).

But because the extent of an official's subjective good faith was a question of fact, which left to a jury typically resulted in the same discovery costs and disruptions of government the immunity doctrine was designed to prevent, in Harlow the Supreme Court modified the "good faith" rule by eliminating the subjective component. The objective element was redefined. Harlow v. Fitzgerald, 102 S.Ct. at 2737.

Today, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly

1/ The authorization requirement, reviewed by this Court in 1980, was not modified in Harlow. See 102 S.Ct. 2739 n.34.

> As the Supreme Court explained in Doe v. McMillan, (412 U.S. 306, 93 S.Ct. 2018, 36 L.Ed. 2d 912 (1975): "The scope of immunity has always been tied to the 'scope of authority'". 412 U.S. at 320, 93 S.Ct. at 2028 (quoting from Wheeldin v. Wheeler, 373 U.S. 647, 651, 83 S.Ct. at 1441, 1444, 10 L.Ed. 2d 605 (1963)). To be entitled to official immunity, therefore, the federal officials must show that their conduct was authorized. The mere fact that certain conduct is authorized, however, is insufficient, in itself, to immunize the conduct of federal officials. See Doe v. McMillan, 412 U.S. at 322, 93 S.Ct. at 2029. In addition to showing proper authorization the federal officials must show that they acted reasonably and in good faith.

Benford v. American Broadcasting Companies, Inc., 502 F.Supp. 1148, 1157-1158 (D.Md. 1980).

established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 102 S.Ct. at 2738. Therefore, the good faith standard is purely objective. It is left to the Court, not the jury, to determine whether the plaintiff's constitutional or statutory rights were clearly established at the time the action complained of occurred. If they are held to have been clearly established, an official can succeed only in extraordinary circumstances by proving he neither knew nor should have known of that established standard. Id. at 2739.

Also relevant to the question presently before the Court is the fact than an official who meets the objectivity test still must show that his conduct was authorized. See note 1, supra. Cf. Nixon v. Fitzgerald, supra. Therefore, officials who act beyond their scope of authority lack standing to assert a qualified immunity defense even in those instances where their behavior does not violate clearly established constitutional or statutory rights of which a reasonable person would have known. Cf. Doe v. McMillan, supra.

II.

THE DOCTRINE OF QUALIFIED IMMUNITY - OBJECTIVE GOOD FAITH

The congressional defendants now contend the Harlow readjustments to the law of official immunity permit this Court to decide the summary judgment motion sub judice without the assistance of a jury. These defendants further argue the record establishes they operated entirely within their official

function, i.e., scope of authority, at the time of their allegedly wrongful conduct, and that they easily satisfy the "objective good faith" standard announced in Harlow for each of the five counts still at issue. The plaintiff, not surprisingly, disagrees.

As a result of the Harlow decision, it is clear this Court may now decide whether the congressional defendants are entitled to qualified immunity in this case. The threshhold question is whether the plaintiff alleged violations of "clearly established statutory or constitutional rights of which a reasonable person would have known". 2/ See Harlow v. Fitzgerald, 102 S.Ct. at 2739. If the law the congressional defendants are charged with violating was clearly established, their qualified immunity argument must be rejected without further consideration. However, if the law at the time of their actions was not clearly established, and they therefore acted reasonably and in good faith within this context, the congressional defendants still must demonstrate they operated within the scope of their authority.

This Court will first separately consider whether each of the remaining causes of action allege violations of laws which were clearly established and which a reasonable person

2/ The Court is aware of the many other arguments the congressional defendants have offered in support of their Motion to Dismiss, or in the alternative, for Summary Judgment. They are still under consideration. This opinion is intended to address the qualified immunity question only.

would have been aware at the time the earlier described events transpired.

A. The State of Maryland Wiretapping and Electronic Surveillance Act.

The plaintiff has charged the congressional defendants with conspiring with ABC to surreptitiously tape and broadcast the November 3, 1978, sales promotion meeting on the ABC Nightly News. In Count I of the complaint, these actions are alleged to have violated the plaintiff's statutorily protected rights as codified in the Maryland Wiretapping and Electronic Surveillance Act, Md. Cts. & Jud. Proc. Ann. § 10-401, et seq.

Generally, this Act prohibits any person from wilfully intercepting, using or disclosing to another the contents of any wire or oral communication which has been obtained through an unlawful interception. It is apparent that the Maryland General Assembly adopted substantially all of the language in Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2510-2520 (1970), with minor modifications, in enacting this legislation. See Gilbert, A Diagnosis, Dissection, and Prognosis of Maryland's News Wiretapping and Electronic Surveillance Law, 8 U. Balt. L. Rev. 183, 191 (1979).

The specific sections of the Maryland Act relevant to the congressional defendants' 1978 investigation and their qualified immunity defense read as follows:

> §10-401. Definitions.
>
> As used in this subtitle, the following terms have the meanings indicated:
>
> (2) "Oral communication" means any conversation or words spoken to or by any person in private conversation.

§10-402. Interception of communications generally.

(a) Unlawful acts. Except as otherwise specifically provided in this subtitle it is unlawful for any person to:

(1) Wilfully intercept, endeavor in intercept, any wire or oral communication;
(2) Wilfully disclose, or endeavor to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subtitle; or
(3) Wilfully use, or endeavor to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subtitle.

Maryland Wiretapping and Electronic Surveillance Act, Md. Cts. & Jud. Proc. Code Ann. (1977).

The congressional defendants herein submit that the Maryland Act was so vague at the time the alleged violation took place, they could not fairly be said to have known the law forbade their conduct. Specifically, these defendants direct this Court's attention to the term "private conversation" as it appears in definitional Section 10-401(2), and suggest there was significant doubt surrounding its' meaning in 1978. The inference they would leave the Court is that not knowing what a "private conversation" was under the Act, they could not possibly have known whether or not they were intercepting an "oral communication" under Section 10-402. Thus, they contend they are not subject to suit as they acted in "good faith" under Harlow. 3/ The ABC defendants suggest that the Maryland Court of Appeals should interpret this section.

3/ The congressional defendants also argue they acted within the scope of their authority, which is the second prong of the qualified immunity test. See note 1, supra.

Having considered this issue, this Court is of the firm opinion the congressional defendants argument that the term "private conversation" is inherently vague, and that the Maryland Act therefore was not "clearly established" within the context of Harlow, is without merit, and there is no reason to certify the question to the Maryland Court of Appeals. One of the clear purposes of the Maryland Act is to prevent, in non-criminal situations, the unauthorized interception of conversations where one of the parties has a reasonable expectation of privacy. Md. Cts. & Jud. Proc. Code Ann. § 10-402(c)(3). Admittedly, the Maryland Act did not define the phrase "private conversation" as it appears in Section 10-402(2). However, it is doubtful that it could have, inasmuch as the rule of reason controls questions concerning expectation of privacy, which, by their nature, are imprecise. See Warren & Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890); Katz v. United States, 389 U.S. 352 (1967). Such questions can only be decided on a case by case basis, a fact which does not in itself make the controlling statute vague or unclear. See Benford v. American Broadcasting Companies, 502 F.Supp. 1159, 1162 (1980). Moreover, the key phrase here is not "private conversation", the defining phrase. Rather, it is "oral communication", the term being defined.

Controlling here is the fact that Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2510(2), which served as a model for the Maryland Act, defines "oral communication" as "any communication uttered by a person

exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation." The law of Maryland provides that the Maryland Wiretapping and Electronic Surveillance Act be read so as to safeguard the public to at least that degree.

> "(W)hile Title III requires an appropriate state act before it can be effectuated, under no circumstances is the law enforceable if it is less restrictive than the federal statute so that it grants the governing power more rights at the expense of its citizens."

State of Maryland v. Siegel, 266 Md. 256, 271, 292 A.2d 86, 94 (1972). As is more fully explained in Section II-C, infra, the plaintiff met the Title III "oral communication" test on November 3, 1978. Inasmuch as the congressional defendants failed to comply with this Title III standard, and the law is clear that the Maryland Act is more restrictive, the congressional defendants cannot be said to have satisfied the objective good faith test as outlined in Harlow.[4/] The Maryland Act was quite clear and understandable. The congressional defendants' request for qualified immunity as to plaintiff's first count must be denied.

B. Common Law Tort Actions

Count II of the plaintiff's complaint alleges the congressional defendants violated the common law of Maryland

4/ In reviewing the congressional defendants' conduct, it also seems appropriate to take note of the Supreme Court's admonition:

> By defining the limits of qualified immunity essentially in objective terms, we provide no license to lawless conduct . . . Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action. Cf. Procunier v. Navarette, 434 U.S. 555, 565, 98 S.Ct. 855, 861 55 L. Ed.(cont.)

by tortiously conspiring, knowingly and maliciously, with ABC to surreptitiously tape and broadcast his November 3, 1978, sales promotion meeting, thereby causing him great injury. Count V avers the congressional defendants' above-described activities interfered with plaintiff's right to pursue a lawful insurance business, and that this was a tortious interference with his business relations. Plaintiff's Count VI seeks damages for tortious invasion of privacy.

The congressional defendants submit Harlow is inapplicable to common law claims, and that a showing they acted within the scope of their authority will altogether immunize them from the legal consequences arising out of their commission, if any, of these common law torts. 5/ The plaintiff disagrees, and contends Harlow is in fact relevant to common law causes of action. In other words, the plaintiff considers the qualified immunity defense to be unavailable to the congressional defendants if this Court finds the laws of Maryland governing the state common law tort claims were clearly established and would reasonably have been known by these defendants at the time of their allegedly wrongful actions occurred, regardless of their scope of authority.

4/ (cont.) 2d 24 (1978) (footnote omitted) ("Because they could not reasonably have been expected to be aware of a constitutional right that had not yet been declared, petitioners did not act with such disregard for established law that their conduct 'cannot reasonably be characterized as being in good faith.'").
Harlow v. Fitzgerald, 102 S.Ct. at 2739.

5/ The congressional defendants phrased their argument as follows:
(T)he qualification or limitation placed on the official immunity by Harlow is only for conduct which 'violate(s) clearly established statutory or constitutional rights . . . ' . . . In regard to common law torts Harlow leaves Butz v. Economou, 438 U.S. 478 (1979) (sic), and Barr v. Matteo,(cont.)

The congressional defendants are correct. In Harlow the Supreme Court modified the standards for qualified immunity narrowly. Only statutory and constitutional claims were affected. The Court's conclusion was clear:

> We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Harlow v. Fitzgerald, 102 S.Ct. at 2738.

In Butz v. Economou, supra, the Supreme Court established this dichotomy by inference. There, qualified immunity defenses raised in response to common law claims and those raised in response to constitutional and statutory claims were considered separately. Therefore, Harlow merely followed precedent, and the qualified immunity defense, as it has traditionally applied to common law actions, was not affected. Consequently, the fact that the Maryland law of torts governing these common law counts was clearly established in November 6, 1978,[6/] does not in and of itself jeopardize the congressional defendants' qualified immunity position. See also Howard v. Lyons, 360 U.S. 593, 79 S.Ct. 1331, 3 L.Ed. 2d 1454 (1959), (where the Supreme Court upheld the pre-trial dismissal of a complaint for defamation

5/ (cont.) 360 U.S. 564 (1959) intact - - government officials are immune from the alleged commission of common law torts if acting within their authority." Congressional Defendants' Supplemental Memorandum on the Impact of Harlow v. Fitzgerald, at 14.

Butz v. Economou and Barr v. Matteo held, inter alia, that a federal official may not be held liable for the commission of a common law tort, despite allegations of malice, so long as his actions were taken within the limits of his authority.

6/ See Green v. Washington Suburban Sanitary Commission, 259 Md. 206, 269 A.2d 815 (1970) (civil conspiracy); Baird v. C&P Tel. Co. of Baltimore, 208 Md. 245, 117 A.2d 873 (1955) (cont.)

under state law, when it was alleged a federal officer knowingly and deliberately published false information; the ground for dismissal was that the officer acted within the scope of his authority); Bishop v. Tice, 622 F.2d 349, 359 (8th Cir. 1980) ("Although federal supervisors would normally enjoy absolute immunity from liability in tort for actions relating to the discharge of their subordinates (citation omitted) absolute immunity is lost when a supervisor adopts means beyond the outer perimeter of his authority"); Mandel v. Nouse, 509 F.2d 1031, 1033 (6th Cir. 1975) ("(e)ach of the defendants was acting within the outer perimeter of his official duties, and they each have immunity from civil defamation suits.")

Therefore, this Court's review of the congressional defendants' qualified immunity defense to these common law counts will be limited to the single issue of whether they acted within the scope of their authority. This is discussed in Section III, infra.

C. Federal Eavesdropping Statute

In Count IV of his complaint, the plaintiff charged the congressional defendants with violating Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2510, et seq.

5/(cont)tortious interference with contract); Beane v. McMullen, 265 Md. 585, 191 A.2d 37, appeal after remand 20 Md. App. 383, 315 A.2d 777 (1972) (interference with business relations, privacy); Carr v. Watkins, 227 Md. 578, 177 A.2d 841 (1962) (privacy).

These sections outline the federal law governing the interception of wire and oral communication and were enacted as a result of Congress' concern that an individual's privacy be protected. See Gelbard v. United States, 408 U.S. 41, 48, 92 S.Ct. 2357, 2361, 33 L.Ed. 2d 179 (1972); U.S. v. Clemente, 482 F.Supp. 102 (D.C.N.Y.), aff'd. 633 F.2d 207 (2d Cir. 1979). Again, the congressional defendants raise the defense of qualified immunity.

The sections of this statute relevant to this decision are as follows:

§ 2510. Definitions.

As used in this chapter -

(2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation;

§ 2511. Interception and disclosure of wire or oral communications prohibited.

(1) Except as otherwise specifically provided in this chapter any person who -

(a) wilfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication; . . .

(c) willfully discloses, or endeavors to disclose to any other person the contents of any wire or oral communication knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(2) (c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in the United States or of any State or for the purpose of committing any other injurious act.

The congressional defendants suggest the Federal Eavesdropping Statute "fails to meet the Harlow test since it does not constitute a clearly established standard which it would have been reasonable for these defendants to believe governed their conduct." 2/ Congressional Defendants' Supplemental

2/ The congressional defendants seek summary judgment as to Count IV on other grounds as well. For example, they argue that even assuming the statute is clear, its terms have not been violated. Because this Memorandum addresses the question of qualified immunity only, these defenses and all others which do not concern the Harlow "objective good faith" standard and the "scope of authority" issue, will not be herein considered.

Memorandum on the Impact of Harlow v. Fitzgerald, at 15.

In particular, these defendants contend the term "oral communication" as defined in 18 U.S.C. § 2510(2) is unclear. This Court disagrees.

> The legislative history behind 2510(2) reflects Congress's intent that Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed 2d 576 (1967), serve as a guide to define communications that are uttered under circumstances justifying an expectation of privacy. S. Rep. No. 1097, 90th Cong. 2d Sess. reprinted in (1968) U.S. Code Cong. & Admin. News pp. 2112, 2178.

United States v. McIntyre, 582 F.2d 1221, 1223 (9th Cir. 1978).

A person's "reasonable expectation of privacy" is a matter to be considered on a case-by-case basis, taking into consideration its' unique facts and circumstances. Benford v. American Broadcasting Companies, 502 F.Supp. 1159, 1162 (D. Md. 1980). Generally, the test applied is two part: (1) Did the person involved have a subjective expectation of privacy; and (2) Was that expectation objectively reasonable? United States v. McIntyre, 582 F.2d at 1223.

In this case and for the purpose of this decision only, both parts of the inquiry must be answered in the affirmative. The plaintiff met in a private home with a select group of individuals who had represented, albeit falsely, they were interested in purchasing insurance. The plaintiff did not personally expect, nor did he intend, for his remarks to be intercepted, partly for broadcast to the American public on national television. Certainly, no reasonable person entering a private home to sell insurance under similar circumstances would have anticipated his conversation would be electronically monitored. The plaintiff, therefore, did partake in an "oral communication", 18 U.S.C. § 2510(2), a term whose meaning this

Court finds was "clearly established" within the context of Harlow, in November,1978. See Benford v. American Broadcasting Companies, 502 F.Supp. 1159, 1162 (D. Md. 1980). Cf.Procunier Navarette, supra. 8/

For these reasons, this Court rejects the congressional defendants' position that Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2510(2), is vague and fails to comport with the "clearly established" standard of Harlow. The congressional defendants' request for qualified immunity as to Count IV of plaintiff's complaint on the basis of Harlow will therefore be denied.

III.

THE DOCTRINE OF QUALIFIED IMMUNITY - SCOPE OF AUTHORITY

This Court, having determined the congressional defendants cannot successfully raise the defense of qualified immunity as to plaintiff's claims under the Maryland Act and The Federal Eavesdropping Statute because they did not meet the objective good faith standard under Harlow, must now determine whether these same defendants acted within the scope of their authority in November, 1978. This question must be addressed in order to determine the viability of the qualified immunity defense with regard to the common law counts. If the congressional defendants acted within the scope of their authority, their summary judgment motion against plaintiff's common law counts will be granted under Butz v. Economou, supra, and Barr v. Matteo, supra. If not, their qualified immunity defense will be denied.

8/ The congressional defendants have offered no authority, nor is this Court aware of any, wherein Section 2510(2) was found to be unreasonably vague or unclear. See e.g. United States v. McIntyre, (cont.)

To make out a defense that he acted within the outer perimeter of his scope of authority, an official must show his authorization was founded in the law. Cunningham v. Macon and Brunswick R. Co., 109 U.S. 446, 452, 3 S.Ct. 292, 297,27 L.Ed. 992 (1883). However, it is not enough that an official's immediate supervisor approved his actions when the supervisor himself lacked authority to sanction the unlawful event:

> For example, Little v. Barreme, 2 Cranch 170, 2 L.Ed. 243 (1804), held the commander of an American warship liable in damages for the seizure of a Danish cargo ship on the high seas. Congress had directed the President to intercept vessels reasonably suspected of being en route to a French port, but the President had authorized the seizure of suspected vessels whether going to or from French ports, and the Danish vessel seized was en route from a forbidden destination. The Court, speaking through Mr. Chief Justice Marshall, held that the President's instructions could not "change the nature of the transaction, or legalize an act which, without those instructions, would have been a plain trespass." Id., at 179 . . .
>
> Bates v. Clark, 95 U.S. 204, 24 L.Ed. 471 (1877), was a similar case. The relevant statute directed seizures of alcoholic beverages in Indian country, but the seizure at issue, which was made upon the orders of a superior, was not made in Indian country. The "objection fatal to all this class of defenses is that in that locality (the seizing officers) were utterly without any authority in the premises" and hence were answerable in damages. Id., at 209 . . .

5/ (cont.) 582 F.2d 1221 (9th Cir. 1978); United States v. Pui Kan Lam, 483 F.2d 1202 (2d Cir.), cert. denied 415 U.S. 984, 94 S.Ct. 1577 (1973).

> In both Barreme and Bates, the officers did not merely mistakenly conclude that the circumstances warranted a particular seizure, but failed to observe the limitations on their category or type of seizures they were authorized to make.

Butz v. Economou, 438 U.S. at 490-91, 98 S.Ct. at 2903 (1978); See also Bushe v. Burkee, 649 F.2d 509 (7th Cir.)cert. denied 102 S.Ct. 396(1981) ("We reject this broad conclusion (that the defendant is not liable) to the extent it may imply that an individual is relieved of personal responsibility for perpetrating unlawful acts against another simply because he is acting as an agent or subject to a superior's orders.")[9/]

Once it is shown the supervisor possessed the legal authority to order his subordinates to act, the remaining hurdle is a showing that the order was in fact given. In this case, the congressional defendants operated under the auspices of the House Select Committee on Aging, whose chairman was, and remains, Congressman Claude D. Pepper (D. Fla.). Although the congressional defendants have submitted much documentation which would indicate the final results of their investigation were well received by Congressman Pepper and other members of the United States House of Representatives,[10/] there is still no record evidence to indicate any individual

9/ This rule makes commonly good sense. One can imagine the consequences were a high ranking official permitted to act as a "straw man" who could broaden the scope of his own authority simply by ordering his subordinates to carry out those tasks he is not permitted to accomplish personally.

10/ The investigation was far-reaching in scope and involved an exhaustive examination and review of the practices of the insurance industry and its impact on the elderly. The plaintiff was only one of dozens of sales people whose tactics were studied. The methods the committee used to investigate varied depending on the circumstances.

member of Congress or staff member of the Select Committee possessed the actual power to arrange and/or authorize the public broadcasting of the plaintiff's November 3, 1978, meeting.[11] Nor is this Court aware of a House resolution or Court order which granted the congressional defendants power to broadcast, with ABC, the plaintiff's November 3,1978 meeting. In the absence of any proof that this authority existed by law, this Court has no choice but to find the congressional defendants' public broadcasting of the plaintiff's meeting was beyond the province of the Select Committee and therefore beyond their permissible scope of authority.[12] See McSurley v. McClellan, 553 F.2d 1277, 1285 (D.C. Cir. 1976) (en banc) ("To the extent plaintiffs charge dissemination outside the Halls of Congress, the federal defendants are not immune to further questioning."); Cf.. Gravel v. United States, 408 U.S. 606, 620, 92 S.Ct. 2614, 2625, 33 L.Ed. 2d 583 (1972)(The Supreme Court has taken "a decidely jaundiced view towards extending the (Speech and Debate) Clause so as to privilege illegal or unconstitutional conduct beyond that essential to foreclose executive control of legislative speech or debate and associated matters such as voting and committee reports and proceedings.")[13]

11/ The congressional defendants suggest their agreement with defendant ABC which resulted in the broadcasting of plaintiff's meeting was directly authorized by Congressman Pepper. This Court need not reach that issue, however, as the threshhold question is whether he had the power to do so. Clearly, he did not.

12/ This Court has already decided, inter alia:

> (T)he publication of the taped meeting of November 3 was not "an integral part of the deliberative and communicative processes" of the Select Committee.

Benford v. American Broadcasting Companies, 502 F.Supp. 1148, 1154 (D.Md. 1980).

13/ The congressional defendants' agreement that they are entitled to qualified immunity solely because their activities were (cont.)

Therefore, because the public broadcasting of plaintiff's November 3, 1978 meeting was properly and adequately alleged tortious interference with plaintiff's business relations and privacy, the broadcast being part of an allegedly unlawful conspiracy, and there being no record evidence to show this broadcast was legitimately authorized by Congress or was part of the deliberative or legislative process; this Court finds that the congressional defendants acted beyond their scope of authority in its making. The congressional defendants are consequently not immune to plaintiff's common law counts.

IV.

CONCLUSION

In conclusion, this Court holds that the congressional defendants are not officially immune to Counts I, II, III, V, and VI of plaintiff's complaint. The Maryland Act and the Federal Eavesdropping Statute were clearly established and would have been known to a reasonable person at the time the defendants surreptitiously taped and broadcast plaintiff's November 3,1978 meeting. Moreover, the congressional defendants have failed to adequately demonstrate that they acted within the scope of their authority in the broadcasting of excerpts of

13/ (cont.) "official" functions, as opposed to legislative functions, is not well taken. This Court has already stated that though it

> "does not question the value of the 'informing function' of Congress, (there appears to be) no legitimate reason for using it as a means of protecting the publication of materials injurious to private individuals."

Benford v. American Broadcasting Companies, Inc., 502 F.Supp. 1148, 1155 (D.Md. 1980). See also: Hutchinson v. Proxmire, 443 U.S. 111, 99 S.Ct. 2675, 61 L.Ed. 2d 411 (1979).

that meeting on national television, said broadcast being well beyond the legislative function.

Accordingly, the congressional defendants request for summary judgment based on qualified immunity is denied, without prejudice to the remaining grounds for dismissal and/or summary judgment which have been alleged and which have not yet been decided; and the stay of discovery as to the congressional defendants, ordered by this Court on July 16, 1982, is hereby lifted.

A separate Order will be entered to effectuate the rulings of this opinion.

Edward S. Northrop
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

GEORGE H. BENFORD	:	
v.	:	CIVIL ACTION NO. N-79-2386
AMERICAN BROADCASTING COMPANIES, INC., and Mrs. Isaac (Betty) Hamburger and Miss Kathleen T. Gardner and Mrs. Lilliam M. Teitelbaum and David L. Holton and Margaret Osmer	:	

ORDER

In accordance with the Memorandum of even date entered in this case, IT IS, this 22nd day of December, 1982, by the United States District Court for the District of Maryland, ORDERED:

1. That the motion of the congressional defendants for summary judgment on the basis of qualified immunity BE, and the same hereby IS, DENIED, with prejudice;

2. That the Stay Order effecting discovery in this case BE, and the same hereby IS, LIFTED; and

3. That the Clerk of Court shall mail copies of the aforegoing Memorandum and this Order to counsel for the parties to this suit.

Edward S. Northrop
Senior United States District Judge

○

No. 82-2145

In the Supreme Court of the United States

OCTOBER TERM, 1982

DAVID L. HOLTON, CHIEF INVESTIGATOR, SELECT COMMITTEE ON AGING, U.S. HOUSE OF REPRESENTATIVES, ET AL., PETITIONERS

v.

GEORGE H. BENFORD, RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

SUPPLEMENTAL APPENDIX TO PETITION

STANLEY M. BRAND,
General Counsel to the Clerk,
STEVEN R. ROSS,
Deputy Counsel to the Clerk,
U.S. House of Representatives,
H-105, The Capitol
Washington, D.C. 20515
(202) 225-7000
Attorneys for Congressional Petitioners.

Of Counsel:
EUGENE GRESSMAN
Special Counsel,
School of Law, University of North Carolina,
Chapel Hill, N.C. 27514 (919) 962-4120

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 83-1168

GEORGE H. BENFORD, APPELLEE,

v.

AMERICAN BROADCASTING COMPANIES, INC., A NEW YORK CORPORATION AND MARGARET OSMER, DEFENDANTS,

and

MRS. ISAAC (BETTY) HAMBURGER AND MISS KATHLEEN T. GARDNER AND MRS. LILLIAN M. TEITELBAUM AND DAVID L. HOLTON, APPELLANTS.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Edward S. Northrop, District Judge.

Submitted: March 18, 1983 Decided: April 11, 1983.

Before HALL and MURNAGHAN, Circuit Judges, HAYNSWORTH, Senior Circuit Judge.

(Michael L. Murray, Stanley M. Brand, and Steven R. Ross for the Appellants. Dean Sharp and Wilson K. Barnes for the Appellee.)

PER CURIAM:

George H. Benford, an independent agent selling cancer insurance policies, filed suit against four staff members employed by the Select Committee on Aging of the United States House of Representatives (the "congressional defendants"), the American Broadcasting Companies, and an ABC employee. The complaint alleges that one congressional defendant, during a Committee investigation of abuses in the sale of insurance to the elderly, infiltrated Benford's business as a trainee and caused him to deliver his standard cancer insurance promotion to two elderly ladies and their male friend, all congressional defendants.[1] ABC surreptitiously filmed the presentation and broadcast portions of it on the ABC Nightly News. Benford then filed this action seeking damages and asserting that the defendants' conduct was unconstitutional, violative of state and federal wiretapping statutes, and tortious.

The Congressional defendants appeal from the denial of their summary judgment motion in which they asserted their entitlement to qualified immunity for their actions. *Benford* v. *American Broadcasting Companies, Inc.*, C/A No. N–79–2386 (D. Md., Dec. 22, 1982). Benford has moved to dismiss the appeal as interlocutory. *See* 28 U.S.C. § 1291. For the following reasons, we agree with Benford and dismiss the appeal.

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[1] The congressional defendants hold varying degrees of job status with the Committee. One is a Chief Investigator, another a professional staff member, and the remaining two are "special senior citizen investigators."

This is the second pre-trial appeal sought by the congressional defendants. In 1980 they moved for summary judgment, arguing that their actions were protected under either the Constitution's Speech or Debate Clause or the common law doctrine of official immunity. In concluding that these defendants were neither covered under the Speech or Debate Clause nor entitled to absolute immunity, the district court recognized that they would be entitled to assert a qualified immunity defense at trial. *Benford* v. *American Broadcasting Companies, Inc.*, 502 F. Supp. 1148, 1151–59 (D. Md. 1980), *aff'd*, 661 F. 2d 917 (4th Cir. [table], *cert. denied*, 454 U.S. 1060 (1981).

In affirming the judgment upon this first appeal, we necessarily addressed the question of our jurisdiction over the seemingly interlocutory appeal of a denial of summary judgment. *Benford* v. *Hamburger*, No. 81–1200 (4th Cir., June 17, 1981) (unpublished), *cert. denied*, 454 U.S. 1060 (1981). We cited *Helstoski* v. *Meanor*, 442 U.S. 500 (1979), for the proposition that the "denial of a dismissal motion based on the Speech or Debate Clause is an appealable final decision under the collateral order doctrine." No. 81–1200, *supra*, slip op. at 3. Our inquiry into the denial of absolute immunity was only "an incidental exercise" of our power to decide the Speech or Debate issue. *Id.*

Shortly after the case was remanded to the district court, the Supreme Court decided *Harlow* v. *Fitzgerald*, —— U.S. ——, 50 U.S.L.W. 4815 (June 24, 1982). In its *Harlow* decision,

the Court revised its standard for entitlement to qualified immunity, facilitating the disposition of this defense by trial courts on summary judgment motions. *Id.* at 4820. The district court accordingly undertook to decide the merits of this defense, as applied to the congressional defendants' actions, and issued its opinion in favor of Benford. It is this order of which these defendants seek immediate review.

Finality, as a condition to appellate review, was written into the first Judiciary Act "and has been departed from only when observance of it would practically defeat the right to any review at all." *Cobbledick* v. *United States*, 39 U.S. 323, 324 (1940), citing §§ 21, 22, 25 of the Act of September 24, 1789, 1 Stat. 73, 83–85. This congressional policy, currently embodied at 28 U.S.C. § 1291, has the rationale of

> forbidding [the] piecemeal disposition on appeal of what for practical purposes is a single controversy . . . [through] the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment.

Cobbledick, supra, at 325; *accord, Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 373–74 (1981); *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 467 n.8 (1978); *United States* v. *MacDonald*, 435 U.S. 850, 853 (1978). In the few instances where it has departed from this general prohibition, the Supreme Court has relied on the "collateral order" exception articulated in *Cohen* v. *Beneficial*

Industrial Loan Corp., 337 U.S. 541, 47 (1949).[2]

At issue in *Cohen* was a series of statutes, passed in the 1940s by many eastern state, requiring small shareholder plaintiffs who brought derivative actions to post security for expenses to be incurred by defendants in the litigation. The defendants took an immediate appeal from a pre-trial order denying their motion for security. The Court held that a "small class" of interlocutory district court decisions are immediately appealable since they (1) finally determine claims of right separable from and collateral to rights asserted in the action, (2) are too important to be denied review, and (3) are too independent of the cause itself to require the deferment of appellate consideration. *Cohen, supra*, at 546. This "small class" of cases was to consist only of those presenting a "serious and unsettled question," *id.* at 547, emphasizing this last requirement: "If the right [to security] were admitted or clear and the order involved only an exercise of discretion as to the amount . . ., appealability would present a different question." *Id.*

An analysis of the order appealed from by the congressional defendants leads us to the conclusion that we lack jurisdiction to decide the questions it presents. In its memorandum accompanying that order, the district court correctly stated that

[2] In addition to this judge-made exception, Congress has provided a right to interlocutory appeal under certain specified circumstances. *See* 28 U.S.C. § 1292.

"government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Benford* v. *American Broadcasting Companies, Inc.*, C/A No. N–79–2386 (D. Md., Dec. 22, 1982), slip op. at 7–8, *quoting Harlow, supra.* The court examined each potential statutory source of the defendants' liability and demonstrated that, in its estimation, a reasonable person pursuing the defendants' activities would have known that he or she was violating clearly established rights. With respect to the claims sounding in common law tort, the district court confined its analysis to whether the congressional defendants were qualifiedly immune because they acted "within the scope of their authority." *Benford, supra,* slip op. at 20–24.

In deciding against these defendants on both issues, the district court left open the possibility that they could prove certain facts at trial which would entitle them to qualified immunity. As to the violations of clearly established statutory rights, the defendants may show extraordinary circumstances and that they neither knew nor should have known of the relevant laws. *Harlow, supra.* With respect to the common-law tort claims, the defendants may show that a member of Congress or staff member of the Select Committee possessed the power to arrange or authorize the taping and public broadcasting and that

the defendants were directly authorized by this person to do the same.

The qualified immunity defense is therefore far from finally determined. "Appeal gives the upper court a power of review, not one of intervention. So long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal." *Cohen, supra,* at 546; *see also Coopers & Lybrand, supra,* at 467–69. Most importantly, although we do not deny that the freedom of congressional workers to tape and broadcast their investigative work presents a serious legal issue, the degree of these workers' immunity is by no means an "unsettled question." *Cohen, supra,* at 547. By this ruling we follow the Supreme Court's lead where, after enunciating its new qualified immunity standard, it remanded to the district court for consideration of factual issues with which the district court was more familiar. *Harlow, supra,* at 4820–21.

We realize that our refusal to take jurisdiction of this appeal conflicts with the D.C. Circuit's recent holding in *McSurely* v. *McClellan,* 697 F.2d 309, 315–16 (D.C. Cir. 1982). That court opined that, prior to the Supreme Court's *Harlow* decision, there was reason to distinguish between the appealability of a summary denial of absolute immunity and one of qualified immunity. *See also Forsyth* v. *Kleindienst,* 599 F.2d 1203, 1207–09 (3rd Cir. 1979), *cert. denied,* 453 U.S. 912 (1981). While absolute immunity was entirely a question of law and so was determined

by judges, *e.g.*, *Nixon* v. *Fitzgerald*, —— U.S. ——, 50 U.S.L.W. 4797 (June 24, 1982), qualified immunity involved a factual determination of subjective "good faith" which had to go to the jury. *See Harlow, supra*, at 4819–20. The Supreme Court jettisoned this factual aspect of the defense in order to facilitate the defeat of insubstantial claims on summary judgment without resort to trial. *Id.* The D.C. Circuit, since it has held orders denying absolute immunity immediately appealable under the *Cohen* doctrine, decided that *Harlow* now mandates a similar application of that doctrine to qualified immunity. *McSurely, supra.*

We do not agree that the summary denial of either kind of immunity is always an immediately appealable order. In its *Cohen* analysis with respect to the appealability of an order denying absolute immunity to former President Nixon, the Supreme Court again stressed that it, and formerly the court of appeals, had jurisdiction over the appeal only because it raised a "serious and unsettled question." *Nixon, supra*, at 4800.[3] In *Harlow*, the Court took jurisdiction for these same reasons, *Harlow, supra*, at 4817 n.11, decided the new standard for qualified immunity, and then remanded to the district court for specific application of the standard.

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[3] The Supreme Court's jurisdiction was invoked under 28 U.S.C. § 1254, a statute investing it with authority to review "[c]ases in" the courts of appeals. The court of appeals' jurisdiction, however, depended on the application of 28 U.S.C. § 1291, since the Supreme Court based its analysis of appealability in the court of appeals on the *Cohen* exception to the finality requirement. *Nixon, supra.*

The Supreme Court has twice held that orders denying claims of absolute immunity are appealable under the *Cohen* doctrine. The "common thread" running through these decisions, however, is "a constitutional right, protected by an express constitutional provision." *Forsyth* v. *Kleindienst*, —— F.2d ——, No. 82–1812 (3d Cir., Jan. 20, 1983), slip op. at 8 (Sloviter, J., dissenting). In *Abney* v. *United States*, 431 U.S. 651 (1977), and in *Helstoski, supra*, the Court held that pre-trial orders in volving, respectively, claims of double jeopardy and the Speech or Debate Clause are "final decisions" under 28 U.S.C. § 1291. The Court stressed that these criminal defendants each contested "the very authority of the Government to hale him into court to face trial on the charge against him." *Helstoski, supra*, at 507, *quoting Abney, supra*, at 659.

These cases, then, are exceptions to the *Cohen* requirement of an "unsettled" question. We do not think that the Supreme Court intended that every civil defendant with some tie to government could impede the progress of litigation against him by claiming this or that immunity and then immediately appealing each separate denial. And if the Court did have this intention, it could not have meant that there be an immediate appeal even when the disappointed movants can still present facts at trial in support of their immunity defense. Since they can appeal upon final judgment, there is no right irretrievably lost to them by this decision.

Accordingly, we grant Benford's motion, dismiss the appeal, and remand the case for further proceedings in the district court.[4] We dispense with oral argument, since the facts and legal arguments are adequately presented in the briefs and record.

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[4] American Broadcasting Companies, Inc., and its employee have moved for leave to intervene in their co-defendants' appeal or, in the alternative, to file an *amicus curiae* brief. This opinion renders their motion moot and it is therefore denied.

JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 83-1168

GEORGE H. BENFORD, APPELLEE,

v.

AMERICAN BROADCASTING COMPANIES, INC., A NEW YORK CORPORATION AND MARGARET OSMER, DEFENDANTS,

and

MRS. ISAAC (BETTY) HAMBURUGER AND MISS KATHLEEN T. GARDNER AND MRS. LILLIAN M. TEITELBAUM AND DAVID L. HOLTON, APPELLANTS.

Appeal from the United States District Court for the ..... District of Maryland.

This cause came on to be heard on the record from the United States District Court for the ..... District of Maryland.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, dismissed. The case is remanded to the United States District Court for the District of Maryland for further proceedings consistent with the opinion of this court filed herewith.

WILLIAM K. SLATE II,
Clerk.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

CIVIL ACTION

No. N-79-2386

GEORGE H. BENFORD

v.

AMERICAN BROADCASTING COMPANIES, INC., AND MRS. ISAAC (BETTY) HAMBURGER AND MISS KATHLEEN T. GARDNER AND MRS. LILLIAN M. TEITELBAUM AND DAVID L. HOLTON AND MARGARET OSMER

Northrop, Senior Judge
Filed: December 22, 1982

Wilson K. Barnes, and Little, Hall & Steinmann, P.A., of Baltimore, Maryland, and Dean E. Sharp of Washington, D.C., for plaintiffs.

Alan I. Baron, of Baltimore, Maryland, and Ellen Scalettar, and Finley, Kumble, Wagner, Heine, Underberg and Casey, of Washington, D.C., for defendants American Broadcasting Co., Inc. and Margaret Osmer.

Stanley M. Brand, Steven R. Ross and Michael L. Murray, Office of the Clerk, United States House of Representatives, of Washington, D.C., for defendants Miss Kathleen T. Gardner, Mrs. Lillian M. Teitelbaum, David L. Holton and Mrs. Isaac (Betty) Hamburger.

Northrop, Senior Judge

MEMORANDUM

Plaintiff, George H. Benford, instituted the present action against American Broadcasting Companies, Inc., (ABC), Margaret Osmer,* an ABC employee, David L. Holton, Chief Investigator for the Select Committee on Aging, United States House of Representatives (Select Committee), Kathleen T. Gardner, professional staff member of the Select Committee, and Betty Hamburger and Lillian M. Teitelbaum, both special senior citizen investigators of the Select Committee. Defendants Holton, Gardner, Hamburger, and Teitelbaum will hereinafter be referred to collectively as the "congressional defendants".** As the complaint is the same as that outlined in detail in *Benford* v. *American Broadcasting Companies, Inc.*, 502 F.Supp. 1148 (D. Md. 1980), the facts need not be repeated exhaustively here.

Briefly, the plaintiff is an insurance salesman who was surreptitiously filmed by ABC while making his standard cancer insurance sales presentation to the congressional defendants, who were posing as prospective purchasers. Portions of that taped meeting were broadcast on the ABC Nightly News, and are alleged to have caused the plaintiff grave financial and other injury. The plaintiff claimed the taping and broadcasting

*Currently Margaret Osmer-McQuade.

**On information and belief, the plaintiff represents to this Court that of these congressional defendants, only defendant Holton continues to regularly perform Congressional/public duties.

subjects the defendants to liability under the Maryland Wiretapping and Electronic Surveillance Act, Md. Cts. & Jud. Proc. Code Ann. §§ 10–401, *et seq.*, (hereinafter sometimes referred to as "The Maryland Act"), the Fourth Amendment of the Constitution, Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 251, *et seq.*, (hereinafter sometimes referred to as the "Federal Eavesdropping Statute"), and the common law torts of civil conspiracy, malicious interference with business relations, and invasion of privacy.

The congressional defendants responded to these charges by filing a motion to dismiss, or alternatively for summary judgment, as to each cause of action. Their primary contentions were that their conduct was absolutely protected by the Speech or Debate Clause of the Constitution, Art. I. § 6, cl. 1, and/or the common law doctrine of official immunity. This Court considered those arguments and, on November 14, 1980, held that the congressional defendants are not absolutely immune under either the Speech or Debate Clause or the official immunity doctrine, but suggested that upon a proper showing, the congressional defendants would be entitled to assert a defense of qualified immunity as defined by the Supreme Court in *Butz* v. *Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed. 2d 895 (1978). *Benford* v. *American Broadcasting Companies, Inc.*, 102 F.Supp. 1148, 1159 (D. Md. (1980)). A decision as to the viability of the qualified immunity defense was not then reached.

Defendants ABC and Osmer then filed motions to dismiss Counts II and IV of plaintiff's amended complaint. Count II alleged defendants violated plaintiff's Fourth Amendment rights

by conducting an unconstitutional search and seizure. Count IV charged the defendants with violating the Federal Eavesdropping Statute. This Court agreed with the defendants ABC and Osmer as to the non-viability of Count II and on November 24, 1980, it was dismissed. Because a genuine issue of material fact remained which would impact on the viabilty of Count IV, this Court refused to dismiss that count. *Benford* v. *American Broadcasting Companies, Inc.*, 502 F.Supp. 1159 (D.Md. 1980). On January 14, 1981, in response to the congressional defendants renewed motion to dismiss, filed November 25, 1980, this Court dismissed Count II of plaintiff's complaint as it applied to the congressional defendants as well.

On July 16, 1982, this Court entered an order staying further discovery in this case with respect to the congressional defendants, pending the Court's consideration of the possible impact of *Nixon* v. *Fitzgerald*, 102 S.Ct. 2690 (1982), and *Harlow* v. *Fitzgerald*, 102 S.Ct. 2727 (1982), on the qualified immunity issue. Written discovery not involving the congressional defendants was not affected by the stay. The parties have since filed exhaustive memoranda outlining their respective positions.

Predictably, the plaintiff and the congressional defendants view *Harlow* from different perspectives. The congressional defendants argue that as a result of these decisions, they are now entitled to summary judgment for all remaining counts on the basis of qualified immunity. The plaintiff, on

the other hand, contends defendants have failed to meet even the threshold requirements necessary to bring *Harlow* into play. Furthermore, even assuming the congressional defendants met their threshhold burden, the plaintiff argues the congressional defendants are nevertheless not entitled to qualified immunity as they have not satisfied the *Harlow* standards. As a result, the plaintiff asks this Court to reject the congressional defendants' renewed claim that they are entitled to summary judgment. The Court will herein decide this narrow, but important question.

I.

Harlow v. *Fitzgerald*

In *Harlow*, the petitioners, Bryce Harlow and Alexander Butterfield, were charged with participating in a conspiracy to violate the constitutional and statutory rights of the respondent, A. Ernest Fitzgerald. The petitioners were aides to former President Richard M. Nixon and were alleged to have arranged for the retaliatory firing of Fitzgerald, a "whistleblower". Fitzgerald was intent on exposing shoddy purchasing practices in the Department of Defense which resulted in cost overruns and which were politically embarrassing to the Nixon administration. The petitioners moved for summary judgment and contended they were entitled to absolute and qualified official immunity as aides to the President.

In reviewing the petitioners' claim of absolute official immunity, the Supreme Court reaffirmed the established principle that government officials are entitled to absolute immunity.

when their special functions or constitutional status requires complete protection from suit. To hold otherwise would be to risk undue interference with their important public duties. The doctrine was not available, however, to aides to the President, either directly or in derivative fashion. Relying on *Butz* v. *Economou, supra,* where the Court earlier held that as a general rule absolute immunity does not protect Cabinet officers, the *Harlow* Court said it would be "untenable to hold absolute immunity an incident of the office of every Presidential subordinate based in the White House". *Harlow* v. *Fitzgerald,* 102 S.Ct. at 2734. Nevertheless, absolute immunity may still be claimed by legislators in their legislative functions, judges in their judicial functions, prosecutors in their prosecutorial functions, executive officers in their adjudicative functions, and by the President of the United States. *Harlow* v. *Fitzgerald,* 102 S.Ct. at 2733. *See also: Eastland* v. *United States Servicemen's Fund,* 421 U.S. 491, 95 S.Ct. 1813, 44 L.Ed. 2d 324 (1975); *Stump* v. *Sparkman,* 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed. 2d 331 (1978); *Butz* v. *Economou, supra, Nixon* v. *Fitzgerald, supra.*

Correspondingly, under *Harlow,* the defense of qualified immunity remains available to public officials, absent special circumstances. To raise this defense, an official must show (1) his actions were taken "reasonably and in good faith",

and (2) that his conduct was authorized.[1]

Prior to *Harlow*, the component parts of the "good faith" standard were identified as being comprised of both objective and subjective elements. The objective element concerned presumptive knowledge of and respect for 'basic, unquestioned constitutional rights', and the subjective element referred to 'permissible intentions'. *Id.* at 2737; *See Wood* v. *Strickland*, 420 U.S. 308, 320, 95 S.Ct. 992, 999, 43 L.Ed. 2d 214 (1975).

But because the extent of an official's subjective good faith was a question of fact, which left to a jury typically resulted in the same discovery costs and disruptions of government the immunity doctrine was designed to prevent, in *Harlow* the Supreme Court modified the "good faith" rule by eliminating the subjective component. The objective element was redefined. *Harlow* v. *Fitzgerald*, 102 S.Ct. at 2737.

Today, "government officials performing discretionary functions generally as shielded from liability for civil damages insofar as their conduct does not violate clearly

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[1] The authorization requirement, reviewed by this Court in 1980, was not modified in *Harlow*. *See* 102 S.Ct. 2739 n.34.

As the Supreme Court explained in *Doe v. McMillan*, (412 U.S. 306, 93 S.Ct. 2018, 36 L.Ed. 21d 912 (1975):

> "The scope of immunity has always been tied to the 'scope of authority' ". 412 U.S. at 320, 93 S.Ct. at 2028 (quoting from *Wheeldin v. Wheeler*, 373 U.S. 647, 651, 83 S.Ct. at 1441, 1444, 10 L.Ed. 2d 605 (1963)). To be entitled to official immunity, therefore, the federal officials must show that certain conduct was authorized. The mere fact that certain conduct is authorized, however, is insufficient, in itself, to immunize the conduct of federal officials. *See Doe v. McMillan*, 412 U.S. at 322, 93 S.Ct. at 2029. In addition to showing proper authorization the federal officials must show that they acted reasonably and in good faith.

Benford v. American Broadcasting Companies, Inc., 502 F.Supp. 1148, 1157–1158 (D.Md. 1980).

established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 102 S.Ct. at 2738. Therefore, the good faith standard is purely objective. It is left to the Court, not the jury, to determine whether the plaintiff's constitutional or statutory rights were clearly established at the time the action complained of occurred. If they are held to have been clearly established, an official can succeed only in extraordinary circumstances by proving he neither knew nor should have known of that established standard. *Id.* at 2739.

Also relevant to the question presently before the Court is the fact that an official who meets the objectivity test still must show that his conduct was authorized. *See* note 1, *supra*. *Cf. Nixon* v. *Fitzgerald*, *supra*. Therefore, officials who act beyond their scope of authority lack standing to assert a qualified immunity defense even in those instances where their behavior does not violate clearly established constitutional or statutory rights of which a reasonable person would have known. *Cf. Doe* v. *McMillan*, *supra*.

II.

THE DOCTRINE OF QUALIFIED IMMUNITY—OBJECTIVE GOOD FAITH

The congressional defendants now contend the *Harlow* readjustments to the law of official immunity permit this Court to decide the summary judgment motion *sub judice* without the assistance of jury. These defendants further argue the record establishes they operated entirely within their official

function, i.e., scope of authority, at the time of their allegedly wrongful conduct, and that they easily satisfy the "objective good faith" standard announced in *Harlow* for each of the five counts still at issue. The plaintiff, not surprising, disagrees.

As a result of the *Harlow* decision, it is clear this Court may now decide whether the congressional defendants are entitled to qualified immunity in this case. The threshold question is whether the plaintiff alleged violations of "clearly established statutory or constitutional rights of which a reasonable person would have known".[2] *See Harlow* v. *Fitzgerald*, 102 S.Ct. at 2739. If the law the congressional defendants are charged with violating was clearly established, their qualified immunity argument must be rejected without further consideration. However, if the law at the time of their actions was not clearly established, and they therefore acted reasonably and in good faith within this context, the congressional defendants still must demonstrate they operated within the scope of their authority.

This Court will first separately consider whether each of the remaining causes of action allege violations of laws which were clearly established and which a reasonable person

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[2] The Court is aware of the many other arguments the congressional defendants have offered in support of their Motion to Dismiss, or in the alternative, for Summary Judgment. They are still under consideration. This opinion is intended to address the qualified immunity question only.

would have been aware at the time the earlier described events transpired.

A. The State of Maryland Wiretapping and Electronic Surveillance Act

The plaintiff has charged the congressional defendants with conspiring with ABC to surreptitiously tape and broadcast the November 3, 1978, sales promotion meeting on the ABC Nightly News. In Count I of the complaint, these actions are alleged to have violated the plaintiff's statutorily protected rights as codified in the Maryland Wiretapping and Electronic Surveillance Act, Md. Cts. & Jud. Proc. Ann. § 10–401, *et seq.*

Generally, this Act prohibits any person from wilfully intercepting, using or disclosing to another the contents of any wire or oral communication which has been obtained through an unlawful interception. It is apparent that the Maryland General Assembly adopted substantially all of the language in Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2510–2520 (1970), with minor modifications, in enacting this legislation. *See Gilbert, A Diagnosis, Dissection, and Prognosis of Maryland's News Wiretapping and Electronic Surveillance Law,* 8 U. Balt. L. Rev. 183, 191 (1979).

The specific sections of the Maryland Act relevant to the congressional defendants' 1978 investigation and their qualified immunity defense read as follows:

> § 10–401. Definitions.
>
> As used in this subtitle, the following terms have the meanings indicated:
>
> (2) "Oral communication" means any conversation or words spoken to or by any person in private conversation.

§ 10–402. Interception of communications generally.

(a) Unlawful acts. Except as otherwise specifically provided in this subtitle it is unlawful for any person to:

(1) Wilfully intercept, endeavor in intercept, any wire or oral communication;

(2) Wilfully disclose, or endeavor to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subtitle; or

(3) Wilfully use, or endeavor to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subtitle.

Maryland Wiretapping and Electronic Surveillance Act, Md. Cts. & Jud. Proc. Code Ann. (1977).

The congressional defendants herein submit that the Maryland Act was so vague at the time the alleged violation took place, they could not fairly be said to have known the law forbade their conduct. Specifically, these defendants direct this Court's attention to the term "private conversation" as it appears in definitional Section 10–401(2), and suggest there was significant doubt surrounding its' meaning in 1978. The inference they would leave the Court is that not knowing what a "private conversation" was under the Act, they could not possibly have known whether or not they were intercepting an "oral communication" under Section 10–402. Thus, they contend they are not subject to suit as they acted in "good faith" under *Harlow*.[3] The ABC defendants suggest that the Maryland Court of Appeals should interpret this section.

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[3] The congressional defendants also argue they acted within the scope of their authority, which is the second prong of the qualified immunity test. *See* note 1, *supra*.

Having considered this issue, this Court is of the firm opinion the congressional defendants' argument that the term "private conversation" is inherently vague, and that the Maryland Act therefore was not "clearly established" within the context of *Harlow*, is without merit, and there is no reason to certify the question to the Maryland Court of Appeals. One of the clear purposes of the Maryland Act is to prevent, in non-criminal situations, the unauthorized interception of conversations where one of the parties has a reasonable expectation of privacy. Md. Cts. & Jud. Proc. Code Ann. § 10–402(c)(3). Admittedly, the Maryland Act did not define the phrase "private conversation" as it appears in Section 10–402(2). However, it is doubtful that it could have, inasmuch as the rule of reason controls questions concerning expectation of privacy, which, by their nature, are imprecise. *See Warren & Brandeis, The Right to Privacy*, 4 Harv. L. Rev. 193 (1890); *Katz* v. *United States*, 389 U.S. 352 (1967). Such questions can only be decided on a case by case basis, a fact which does not in itself make the controlling statute vague or unclear. *See Benford* v. *American Broadcasting Companies*, 502 F.Supp. 1159, 1162 (1980). Moreover, the key phrase here is not "private conversation", the defining phrase. Rather, it is "oral communication", the term being defined.

Controlling here is the fact that Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2510(2), which served as a model for the Maryland Act, defines "oral communication" as "any communication uttered by a person

exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation." The law of Maryland provides that the Maryland Wiretapping and Electronic Surveillance Act be read so as to safeguard the public to at least that degree.

> "(W)hile Title III requires an appropriate state act before it can be effectuated, under no circumstances is the law enforceable if it is less restrictive than the federal statute so that it grants the governing power more rights at the expense of its citizens."

State of Maryland v. *Siegel*, 266 Md. 256, 271, 292 A.2d 86, 94 (1972). As is more fully explained in Section II–C, *infra*, the plaintiff met the Title III "oral communication" test on November 3, 1978. Inasmuch as the congressional defendants failed to comply with this Title III standard, and the law is clear that the Maryland Act is more restrictive, the congressional defendants cannot be said to have satisfied the objective good faith test as outlined in *Harlow*.[4] The Maryland Act was quite clear and understandable. The congressional defendants' request for qualified immunity as to plaintiff's first count must be denied.

B. Common Law Tort Actions

Count II of the plaintiff's complaint alleges the congressional defendants violated the common law of Maryland

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[4] In reviewing the congressional defendants' conduct, it also seems appropriate to take note of the Supreme Court's admonition:

> By defining the limits of qualified immunity essentially in objective terms, we provide no license to lawless conduct . . . Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action. *Cf. Procunier* v. *Navarette*, 434 U.S. 555, 565, 98 S.Ct. 855, 861 55 L.Ed. (cont.)

by tortiously conspiring, knowingly and maliciously, with ABC to surreptitiously tape and broadcast his November 3, 1978, sales promotion meeting, thereby causing him great injury. Count V avers the congressional defendants' above-described activities interfered with plaintiff's right to pursue a lawful insurance business, and that this was a tortious interference with his business relations. Plaintiff's Count VI seeks damages for tortious invasion of privacy.

The congressional defendants submit *Harlow* is inapplicable to common law claims, and that a showing they acted within the scope of their authority will altogether immunize them from the legal consequences arising out of their commission, if any, of these common law torts.[5] The plaintiff disagrees, and contends *Harlow* is in fact relevant to common law causes of action. In other words, the plaintiff considers the qualified immunity defense to be unavailable to the congressional defendants if this Court finds the laws of Maryland governing the state common law tort claims were clearly established and would reasonably have been known by these defendants at the time of their allegedly wrongful actions occurred, regardless of their scope of authority.

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[4](cont.) 2d 24 (1978) (footnote omitted) ("Because they could not reasonably have been expected to be aware of a constitutional right that had not yet been declared, petitioners did not act with such disregard for established law that their conduct 'cannot reasonably be characterized as being in good faith.' ")

Harlow v. Fitzgerald, 102 S.Ct. at 2739.

[5] The Congressional defendants phrased their argument as follows:

> (T)he qualification or limitation placed on the official immunity by *Harlow* is only for conduct which 'violate(s) clearly established *statutory* or *constitutional* rights . . . .' . . . In regard to common law torts *Harlow* leaves Butz v. Economou, 438 U.S. (1979) (sic), and Barr v. Matteo, (cont.)

The congressional defendants are correct. In *Harlow* the Supeme Court modified the standards for qualified immunity narrowly. Only statutory and constitutional claims were affected. The Court's conclusion was clear:

> We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Harlow v. *Fitzgerald*, 102 S.Ct. at 2738.

In *Butz* v. *Economou*, *supra*, the Supreme Court established this dichotomy by inference. There, qualified immunity defenses raised in response to common law claims and those raised in response to constitutional and statutory claims were considered separately. Therefore, *Harlow* merely followed precedent, and the qualified immunity defense, as it has traditionally applied to common law actions, was not affected. Consequently, the fact that the Maryland law of torts governing these common law courts was clearly established in November 6, 1978,[6] does not in and of itself jeopardize the congressional defendants' qualified immunity position. *See also Howard* v. *Lyons*, 360 U.S. 593, 79 S.Ct. 1331, 3 L.Ed. 2d 1454 (1959), (where the Supreme Court upheld the pre-trial dismissal of a complaint for defamation

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[5](cont.) 360 U.S. 564 (1959) intact—government officials are immune from the alleged commission of common law torts if acting within their authority."

Congressional Defendants' Supplemental Memorandum on the Impact of Harlow v. Fitzgerald, at 14.

Butz v. Economou and Barr v. Matteo held, *inter alia*, that a federal official may not be held liable for the commission of a common law tort, despite allegations of malice, so long as his actions were taken within the limits of his authority.

[6] *See* Green v. Washington Suburban Sanitary Commission, 259 Md. 206, 269 A.2d 815 (1970) (civil conspiracy); Baird v. C&P Tel. Co. of Baltimore, 208 Md. 245, 117 A.2d 873 (1955) (cont.)

under state law, when it was alleged a federal officer knowingly and deliberately published false information; the ground for dismissal was that the officer acted within the scope of his authority); *Bishop* v. *Tice*, 622 F.2d 349, 359 (8th Cir. 1980) ("Although federal supervisors would normally enjoy absolute immunity from liability in tort for actions relating to the discharge of their subordinates (citation omitted) absolute immunity is lost when a supervisor adopts means beyond the outer perimeter of his authority"); *Mandel* v. *Nouse*, 509 F.2d 1031, 1033 (6th Cir. 1975) ("(e)ach of the defendants was acting within the outer perimeter of his official duties, and they each have immunity from civil defamation suits.")

Therefore, this Court's review of the congressional defendants' qualified immunity defense to these common law counts will be limited to the single issue of whether they acted within the scope of their authority. This is discussed in Section III, *infra*.

C. Federal Eavesdropping Statute

In Count IV of his complaint, the plaintiff charged the congressional defendants with violating Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2510, *et seq.*

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[6] (cont.) tortious interference with contract); Beane v. McMullen, 265 Md. 585, 191 A.2d 37, *appeal after remand* 20 Md. App. 383, 315 A.2d 777 (1972) (interference with business relations, privacy); Carr v. Watkins, 227 Md. 578, 177 A.2d 841 (1962) (privacy).

These sections outline the federal law governing the interception of wire and oral communication and were enacted as a result of Congress' concern that an individual's privacy be protected. *See Gelbard* v. *United States*, 408 U.S. 41, 48, 92 S.Ct. 2357, 2361, 33 L.Ed. 2d 179 (1972); *U.S.* v. *Clemente*, 482 F.Supp. 102 (D.C.N.Y.), *aff'd.* 633 F.2d 207 (2d Cir. 1979). Again, the congressional defendants raise the defense of qualified immunity.

The sections of this statute relevant to this decision are as follows:

§ 2510. Definitions.

As used in this chapter—

(2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation;

§2511. Interception and disclosure of wire or oral communications prohibited.

(1) Except as otherwise specifically provided in this chapter any person who—

(a) wilfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication; . . .

(c) willfully discloses, or endeavors to disclose to any other person the contents of any wire or oral communication knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(2)(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in the United States or of any State or for the purpose of committing any other injurious act.

The congressional defendants suggest the Federal Eavesdropping Statute "fails to meet the *Harlow* test since it does not constitute a clearly established standard which it would have been reasonable for these defendants to believe governed their conduct."[7] *Congressional Defendants' Supplemental*

[7] The congressional defendants seek summary judgment as to Count IV on other grounds as well. For example, they argue that even assuming the statute is clear, its terms have not been violated. Because this Memorandum addresses the question of qualified immunity only, these defenses and all others which do not concern the *Harlow* "objective good faith" standard and the "scope of authority" issue, will not be herein considered.

Memorandum on the Impact of Harlow v. *Fitzgerald*, at 15. In particular, these defendants contend the term "oral communication" as defined in 18 U.S.C. § 2510(2) is unclear. This Court disagrees.

> The legislative history behind 2510(2) reflects Congress's intent that *Katz* v. *United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L.Ed 2d 576 (1967), serve as a guide to define communications that are uttered under circumstances justifying an expectation of privacy. S. Rep. No. 1097, 90th Cong. 2d Sess. *reprinting in* (1968) U.S. Code Cong. & Admin. News pp. 2112, 2178.

United States v. *McIntyre*, 582 F.2d 1221, 1223 (9th Cir. 1978).

A person's "reasonable expectation of privacy" is a matter to be considered on a case-by-case basis, taking into consideration its unique facts and circumstances. *Benford* v. *American Broadcasting Companies*, 502 F.Supp. 1159, 1162 (D. Md. 1980). Generally, the test applied is two part: (1) Did the person involved have a subjective expectation of privacy; and (2) Was that expectation objectively reasonable? *United States* v. *McIntyre*, 582 F.2d at 1223.

In this case and for the purpose of this decision only, both parts of the inquiry must be answered in the affirmative. The plaintiff met in a private home with a select group of individuals who had represented, albeit falsely, they were interested in purchasing insurance. The plaintiff did not personally expect, nor did he intend, for his remarks to be intercepted, partly for broadcast to the American public on national television. Certainly, no reasonable person entering a private home to sell insurance under similar circumstances would have anticipated his conversation would be electronically monitored. The plaintiff, therefore, did partake in an "oral communication", 18 U.S.C. § 2510 (2), a term whose meaning this

Court finds was "clearly established" within the context of *Harlow*, in November, 1978. *See Benford* v. *American Broadcasting Companies*, 502 F.Supp. 1159, 1162 (D. Md. 1980). *Cf. Procunier Navarette, supra.*[8]

For these reasons, this Court rejects the congressional defendants' position that Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2510(2), is vague and fails to comport with the "clearly established" standard of *Harlow*. The congressional defendants' request for qualified immunity as to Count IV of plaintiff's complaint on the basis of *Harlow* will therefore be denied.

III.

THE DOCTRINE OF QUALIFIED IMMUNITY— SCOPE OF AUTHORITY

This Court, having determined the congressional defendants cannot successfully raise the defense of qualified immunity as to plaintiff's claims under the Maryland Act and The Federal Eavesdropping Statute because they did not meet the objective good faith standard under *Harlow*, must now determine whether these same defendants acted within the scope of their authority in November, 1978. This question must be addressed in order to determine the viability of the qualified immunity defense with regard to the common law counts. If the congressional defendants acted within the scope of their authority, their summary judgment motion against plaintiff's common law counts will be granted under *Butz* v. *Economou, supra*, and *Barr* v. *Matteo, supra*. If not, their qualified immunity defense will be denied.

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[8] The congressional defendants have offered no authority, nor is this Court aware of any, wherein Section 2510(2) was found to be unreasonably vague or unclear. *See* e.g. United States v. McIntyre (cont.)

To make out a defense that he acted within the outer perimeter of his scope of authority, an official must show his authorization was founded in the law. *Cunningham* v. *Macon and Brunswick R. Co.*, 109 U.S. 446, 452, 3 S.Ct. 292, 297, 27 L.Ed. 992 (1883). However, it is not enough that an official's immediate supervisor approved his action when the supervisor himself lacked authority to sanction the unlawful event:

> For example, *Little* v. *Barreme*, 2 Cranch 170, 2 L.Ed. 243 (1804), held the commander of an American warship liable in damages for the seizure of a Danish cargo ship on the high seas. Congress had directed the President to intercept vessels reasonably suspected of being en route *to* a French port, but the President had authorized the seizure of suspected vessels whether going *to* or *from* French ports, and the Danish vessel seized was en route *from* a forbidden destination. The Court, speaking through Mr. Chief Justice Marshall, held that the President's instructions could not "change the nature of the transaction, or legalize an act which, without those instructions, would have been a plain trespass." *Id.*, at 179 . . .
>
> *Bates* v. *Clark*, 95 U.S. 204, L.Ed. 471 (1877), was a similar case. The relevant statute directed seizures of alcoholic beverages in Indian country, but the seizure at issue, which was made upon the orders of a superior, was not made in Indian country. The "objection fatal to all this class of defenses is that in that locality (the seizing officers) were utterly without any authority in the premises" and hence were answerable in damages. *Id.*, at 209 . . .

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*(cont.) 582 F.2d 1221 (9th Cir. 1978); United States v. Pui Kan Lam, 483 F.2d 1202 (2d Cir.), *cert. denied* 415 U.S. 984, 94 S.Ct. 1577 (1973).

> In both *Barreme* and *Bates*, the officers did not merely mistakenly conclude that the circumstances warranted a particular seizure, but failed to observe the limitations on their category or type of seizures they were authorized to make.

Butz v. Economou, 439 U.S. at 490–91, 98 S. Ct. at 2903 (1978); *See also Bushe* v. *Burkee*, 649 F.2d 509 (7th Cir.) *cert. denied* 102 S. Ct. 396 (1981) ("We reject this broad conclusion (that the defendant is not liable) to the extent it may imply that an individual is relieved of personal responsibility for perpetrating unlawful acts against another simply because he is acting as an agent or subject to a superior's orders.") [9]

Once it is shown the supervisor possessed the legal authority to order his subordinates to act, the remaining hurdle is a showing that the order was in fact given. In this case, the congressional defendants operated under the auspices of the House Select Committee on Aging, whose chairman was, and remains, Congressman Claude D. Pepper (D. Fla.). Although the congressional defendants have submitted much documentation which would indicate the final results of their investigation were well received by Congressman Pepper and other members of the United States House of Representatives,[10] there is still no record evidence to indicate any individual

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[9] This rule makes commonly good sense. One can imagine the consequences were a high ranking official permitted to act as a "straw man" who could broaden the scope of his own authority simply by ordering his subordinates to carry out those tasks he is not permitted to accomplish personally.

[10] The investigation was far-reaching in scope and involved an exhaustive examination and review of the practices of the insurance industry and its impact on the elderly. The plaintiff was only one of dozens of sales people whose tactics were studied. The methods the committee used to investigate varied depending on the circumstances.

member of Congress or staff member of the Select Committee possessed the actual power to arrange and/or authorize the public broadcasting of the plaintiff's November 3, 1978, meeting.[11] Nor is this Court aware of a House resolution or Court order which granted the congressional defendants power to broadcast, with ABC, the plaintiff's November 3, 1978 meeting. In the absence of any proof that this authority existed by law, this Court has no choice but to find the congressional defendants' public broadcasting of the plaintiff's meeting was beyond the province of the Select Committee and therefore beyond their permissible scope of authority.[12] *See McSurley* v. *McClellan*, 553 F.2d 1277, 1285 (D.C. Cir. 1976) (*en banc*) ("To the extent plaintiffs charge dissemination outside the Halls of Congress, the federal defendants are not immune to further questioning."); *Cf. Gravel* v. *United States*, 408 U.S. 606, 620, 92 S. Ct. 2614, 2625, 33 L.Ed. 2d 583 (1972) (The Supreme Court has taken "a decidedly jaundiced view towards extending the (Speech and Debate) Clause so as to privilege illegal or unconstitutional conduct beyond that esesntial to foreclose executive control of legislative speech or debate and associated matters such as voting and committee reports and proceedings.") [13]

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[11] The congressional defendants suggest their agreement with defendant ABC which resulted in the broadcasting of plaintiff's meeting was directly authorized by Congressman Pepper. This Court need not reach that issue, however, as the threshhold question is whether he had the power to do so. Clearly, he did not.

[12] This Court has already decided, *inter alia:*

> (T)he publication of the taped meeting of November 3 was not "an integral part of the deliberative and communicative processes" of the Select Committee.

Benford v. American Broadcasting Companies, 502 F. Supp. 1148, 1158 (D. Md. 1980).

[13] The congressional defendants' agreement that they are entitled to qualified immunity solely because their activities were (cont.)

Therefore, because the public broadcasting of plaintiff's November 3, 1978 meeting was properly and adequately alleged tortious interference with plaintiff's business relations and privacy, the broadcast being part of an allegedly unlawful conspiracy, and there being no record evidence to show this broadcast was legitimately authorized by Congress or was part of the deliberative or legislative process; this Court finds that the congressional defendants acted beyond their scope of authority in its making. The congressional defendants are consequently not immune to plaintiff's common law counts.

IV.

CONCLUSION

In conclusion, this Court holds that the congressional defendants are not officially immune to Counts I, II, III, V, and VI of plaintiff's complaint. The Maryland Act and the Federal Eavesdropping Statute were clearly established and would have been known to a reasonable person at the time the defendants surreptitiously taped and broadcast plaintiff's November 3, 1978 meeting. Moreover, the congressional defendants have failed to adequately demonstrate that they acted within the scope of their authority in the broadcasting of excerpts of

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[13](cont.) "official" functions, as opposed to legislative functions, is not well taken. This Court has already stated that though it

> "does not question the value of the 'informing function' of Congress, (there appears to be) no legitimate reason for using it as a means of protecting the publication of materials injurious to private individuals."

Benford v. American Broadcasting Companies, Inc., 502 F.Supp. 1148, 1155 (D.Md. 1980). *See also:* Hutchinson v. Proxmire, 443 U.S. 111, 99 S.Ct. 2675, 61 L. Ed. 2d 411 (1979)

that meeting on national television, said broadcast being well beyond the legislative function.

Accordingly, the congressional defendants request for summary judgment based on qualified immunity is denied, without prejudice to the remaining grounds for dismissal and/or summary judgment which has been alleged and which have not yet been decided; and the stay of discovery as to the congressional defendants, ordered by this Court on July 16, 1982, is hereby lifted.

A separate Order will be entered to effectuate the rulings of this opinion.

EDWARD S. WORTHROP,
Senior United States District Judge.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

CIVIL ACTION

No. N-79-2386

GEORGE H. BENFORD

v.

AMERICAN BROADCASTING COMPANIES, INC., AND MRS. ISAAC (BETTY) HAMBURGER AND MISS KATHLEEN T. GARDNER AND MRS. LILLIAN M. TEITELBAUM AND DAVID L. HOLTON AND MARGARET OSMER

ORDER

In accordance with the Memorandum of even date entered in this case, IT IS, this 22nd day of December, 1982, by the United States District Court for the District of Maryland, ORDERED:

1. That the motion of the congressional defendants for summary judgment on the basis of qualified immunity BE, and the same hereby IS, DENIED, with prejudice;

2. That the Stay Order effecting discovery in this case BE, and the same hereby IS, LIFTED; and

3. That the Clerk of Court shall mail copies of the aforegoing Memorandum and this Order to counsel for the parties to this suit.

EDWARD S. NORTHROP,
Senior United States District Judge.

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No. 82-2145

In the Supreme Court of the United States

OCTOBER TERM, 1982

DAVID L. HOLTON, CHIEF INVESTIGATOR, SELECT COMMITTEE ON AGING, U.S. HOUSE OF REPRESENTATIVES ET AL., PETITIONERS

v.

GEORGE H. BENFORD, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL BRIEF ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

STANLEY M. BRAND,
General Counsel to the Clerk,
STEVEN R. ROSS,
Deputy Counsel to the Clerk,
U.S. House of Representatives,
H-105, The Capitol,
Washington, D.C. 20515.
(202) 225-7000
Attorneys for Congressional Petitioners.

Of Counsel:
EUGENE GRESSMAN
Special Counsel,
School of Law,
University of North Carolina,
Chapel Hill, N.C. 27514.
(919) 962-4120

TABLE OF AUTHORITIES

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v.

GEORGE H. BENFORD, RESPONDENT

SUPPLEMENTAL BRIEF ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners, four members of the staff of the Select Committee on Aging of the United States House of Representatives, through the General Counsel to the Clerk of the United States House of Representatives, respectfully submit this supplemental petition for a certiorari to apprise the Court of late authorities and other intervening matters which were not available in time to have been included in the original Petition for a Writ of Certiorari. Sup. Ct. Rule 22.6.

The petition seeks review of the ruling by the United States Court of Appeals for the Fourth Circuit that a district court's pre-trial denial of congressional aides' claim of official immunity under *Harlow* v. *Fitzgerald*, 102 S.Ct. 2727 (1982) is not an appealable final order. *David Holton, Chief Investigator, et al.* v. *George H. Benford*, S.Ct. No. 82-2145 (July 1, 1983) Pet. for Cert. 12-13.

Recent developments since the filing of the petition by congressional aides emphasize the importance of granting certiorari to resolve the conflict in the circuits over the appealability of denials of claims of official immunity by government officials.

1. First, as previously indicated, Pet. for Cert., p. 13, n.6, the Clerk of the House of Representatives has been adjudged in contempt by the district court for Maryland for failure to produce legislative branch records pursuant to adoption of House Resolution 176. 126 Cong. Rec. H2450-2457 (daily ed., Apr. 28, 1983). At the time the petition was filed, the imposition of the $500 a day fine accompanying the contempt had been temporarily stayed to July 8, 1983, pending consideration of objections to be interposed by the Clerk, a filing of an appeal or purging of the contempt by compliance. Following rejection of the Clerk's objections and a motion for reconsideration the district court lifted the stay and refused to grant a stay of the contempt fine pending appeal. The Clerk subsequently applied for a stay of the contempt fine pending appeal in the court of appeals, which was granted by the court of appeals on August 22, 1983.[1]

2. In addition to the extensive documentary discovery being sought from the Clerk of the House, respondent has obtained orders from the district court compelling answers to questions posed during depositions of congressional aides concerning the investigation by the Select Committee on Aging into abusive sales practices. The congressional aides invoked their speech or debate clause right not to be "questioned" concerning the performance of legislative acts during deposition, *Gravel* v. *United States*, 408 U.S. 606, 612 (1972), *Eastland* v. *United States*

[1] The precise effect of the stay ordered by the court of appeals is unclear. The court did not stay the contempt fine "in its accumulation guise." Rather, the Court stated that "in the event the order should be finally affirmed on appeal we do not intend to be met with a contention that the stay of the order led to abrogation of the $500 per day civil contempt penalty, either *ab initio* and in its entirety or from and after the day of the entry of the stay." *See* Appendix A.

Servicemen's Fund, 421 U.S. 491, 501 (1975) and have appealed from the order compelling answers. *Helstoski* v. *Meanor,* 442 U.S. 500 (1979).[2]

These proceedings, involving broad ranging and intrusive probes into the Select Committee's investigation, and questioning of committee aides, heighten "the separation of powers concerns" at the core of the *Harlow* admonition to resolve the immunity claims of government officials on summary judgment "without resort to trial." 102 S. Ct. at 2736. And while the claim of immunity is being adjudicated "discovery *should not* be allowed." *Id.,* at 2739.

But the court of appeals' refusal to adjudicate the immunity claims by dismissing the petitioners appeal has fostered an escalating conflict with the House of Representatives over the permissible limits of a civil litigant's voracious appetite for discovery. This failure to establish on a nationwide basis the applicability of the *Harlow* ruling will only create further uncertainty and conflict in this and other cases.

3. On July 24, 1983 the insubstantiality of respondent's claims were previewed when the United States District Court for the Eastern District of Virginia granted a motion for directed verdict by congressional aides at the close of plaintiff's case alleging violation of the federal wiretapping statute, 18 U.S.C. §§ 2510 *et seq.*, in a companion case arising from the same Select Committee investigation. *Glenda C. Brown* v. *American Broadcasting Co., Inc.,* Civil Action No. 81-0871A (E.D. Va., July 25, 1983).

While initially denying the congressional aides pre-trial motion for summary judgment, as well as a request for a stay of the trial to permit appellate review of the congressional aides' immunity claims, the District Court dis-

[2] The court of appeals presently has under consideration: (1) a motion by respondent Benford to dismiss the appeal of the congressional aides as non-final, which has been opposed by petitioners Holton and Gardner; and (2) consolidation of the appeal of the Congressional aides with the appeal of the Clerk.

missed the case because of the lack of any evidence that congressional defendants violated the statutory rights of the plaintiff.

The District Court dismissal only *after* forcing congressional aides to face exposure to trial, despite the admonition of *Harlow* that insubstantial suits against government officials "without resort to trial," S.Ct. at 2736, emphasizes the intolerable state of affairs in the Fourth Circuit and the absolute necessity for resolving the existing conflict with the D.C. Circuit. *McSurely* v. *McClellan*, 697 F.2d 309 (D.C. Cir. 1982).

This companion case also undercuts respondent's assertion that the question is unworthy of consideration by this Court because it represents an isolated aberration and has no precedential impact. Obviously, district judges in the Fourth Circuit feel bound by its holding because the district court declined to stay the trial to permit congressional aides to appeal the denial of summary judgment.

4. Following filing of the petition for certiorari, counsel for petitioners became aware of other litigation, commenced by American Family Life Assurance Company ("AFLAC")—the insurance company for which respondent Benford acts as state manager for Maryland whose product was the subject of the sales meeting forming the basis for suit in this case—against the governor of Missouri for allegedly violating its civil rights, tortiously interferring with its contract rights and uttering falsehoods against it. *American Family Life Assurance Company of Columbus* v. *Teasdale*, No. 81-0317-CV-W-5 (W.D. Mo.).

Following a seven-day jury trial resulting in a jury verdict on all counts for the defendant, the court ordered plaintiff to pay a total of $63,287.31 to the former Governor for his attorneys' fees and expenses under the Civil Rights Act, 42 U.S.C. § 1988. *American Family Life Assurance Company of Columbus* v. *Teasdale*, 564 F.Supp. 1571 (W.D. Mo. 1983).

The District Court branded the litigation "vexatious, frivolous, groundless, meritless, unreasonable, [and] brought to harass or embarrass." 564 F.Supp. at 1572. After thus characterizing the efforts of American Family Life Assurance Company to harass the Governor, the district court referred to "testimony [at] trial . . . [which] indicated that the insurance company has filed similar suits against other parties who have publicly criticized the business practices of the cancer insurance industry. Most of these critical statements followed Congressional reports condemning the cancer insurance business." *Id.* at 1573. The court also noted that "[t]he insurance company has never won one of its suits." *Id.*

And finally, the district court lamented the state of the law which permits frivolous suits to reach juries and the abuse of process implicated by American Family's use of the judicial process vindictively against public officials protecting the public from sharp and unethical sales practices—the very same practices engaged in by representatives of American Family at issue in this case.

The recognition by the District Court in Missouri of the insubstantiality of American Family's claims, and its reference to other "similar suits," is further justification for instructing the courts of appeals to review such claims before trial and establishing a uniform rule for the federal courts in this area.

These additional developments since filing of the petition further support review of the case by this Court to decide the appealability question.

STANLEY M. BRAND,
General Counsel to the Clerk,
STEVEN R. ROSS,
Deputy Counsel to the Clerk,
U.S. House of Representatives,
H-105 The Capitol,
Washington, D.C. 20515 (202) 225-7000
Counsel for Petitioner.

Of Counsel:
EUGENE GRESSMAN,
Special Counsel,
School of Law,
University of North Carolina,
Chapel Hill, N.C. 27514.
(919) 962-4120

SEPTEMBER 1983

APPENDIX A

United States Court of Appeals for the Fourth Circuit

No. 83-1653

In re: BENJAMIN J. GUTHRIE, CLERK,
U.S. House of Representatives.

MEMORANDUM AND ORDER

We here consider an application dated July 27, 1983 and filed July 28, 1983, for a stay of an order pending an appeal which has been timely lodged and should reach the Court for consideration and decision in the period of a few months' time. The case concerns activities of a commercial television system, operated by American Broadcasting Companies, Inc., and of several employees (congressional staff of the Select Committee on Aging) of the House of Representatives which the plaintiff, George H. Benford, contends were tortious, exposing them to liability for damages.[1] For prior evolutionary stages of the con-

[1] The congressional staff defendants arranged a television broadcast of a sales meeting conducted by the plaintiff filmed, it is alleged, without the knowledge or consent of the plaintiff, and surreptitiously attended by the defendants who were members of staff of the House Select Committee on Aging. The plaintiff claims invasion of privacy, malicious interference with business relations, civil conspiracy and

Continued

troversy see *Benford* v. *American Broadcasting Cos., Inc.* 502 F. Supp. 1148 (D: Md. 1980), *aff'd* 661 F.2d 917 (4th Cir. 1981), *cert. den. sub nom. Holton* v. *Benford,* 454 U.S. 1060 (1981); *Benford* v. *American Broadcasting Co.,* 554 F. Supp. 145 (D. Md. 1982), *Appeal dismissed* (4th Cir. 1982), *petition for certiorari filed* (S. Ct. No. 82-2145, July 1, 1983); *Benford* v. *American Broadcasting Cos., Inc.,* Misc. No. 82-35 (District Court for the District of Columbia 1982).

In preparation for trial, the plaintiff has sought discovery of numerous documents located in the files of the House of Representatives and under the custody of Benjamin J. Gurthrie, the House's Clerk. The district court has, by its order of January 26, 1983, refused to quash a subpoena calling for production of the documents, thereby directing production of the documents. The House of Representatives, believing that the conduct of its affairs would be prejudiced by disclosure of the documents, or perhaps by a more general concern about the unrestricted availability of House files to inspection, has on April 28, 1983 adopted House Resolution No. 176 forbidding the Secretary to comply with the January 26, 1983 order of the district court. H.R. Res. 176, 98th Cong., 1st Sess., 129 CONG. REC. 2450 (1983). The district court has responded with its order of June 24, 1983 holding the clerk of the House of Representatives in civil contempt for refusal to comply with its January 26, 1983 order and imposing a fine of $500 for each day of continued refusal, *i.e.,* to accumulate until a purging of the contempt through compliance with the order of January 26, 1983 has occurred. The June 24, 1983 order provided that it should be stayed, *inter alia,* "to give the Clerk the opportunity to . . . appeal this decision . . . [such] stay . . . [to] continue so long as . . . an appeal remains undecided."

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violation of the Maryland Wiretapping and Electronic Surveillance Act (Maryland Code Annotated, Courts and Judicial Proceedings Article §§ 10-401 *et seq.*) the Fourth Amendment and the Federal Eavesdropping Statute (18 U.S.C. §§ 2510 *et seq.*).

On July 9, 1983 the district court denied a motion for reconsideration and lifted the stay.

The Clerk of the House of Representatives on July 12, 1983 appealed the order of June 24, 1983 adjudging him in contempt and the July 9, 1983 denial of a motion for reconsideration. He seeks a stay pending resolution of the appeal.

On July 14, 1983 the Clerk also requested a stay of the district court, which request, on July 16, 1983, was denied in part "and particularly because an appeal has now been filed, if a stay is to be imposed, it would more properly be ordered by the United States Court of Appeals for the Fourth Circuit."

Having reviewed the file and in particular the application for a stay, and the response of Benford thereto dated July 29, 1983 and filed August 8, 1983, we have reached the following conclusions and make the following observations:

1) A stay customarily is sought with respect to a district court order complete in its impact, particularly in the quantum of any relief provided. Here, however, the amount payable under the district court order continues to increase by $500 for each day that it remains uncomplied with. That consideration clouds the question of just what is the *status quo,* which a stay is intended to preserve.

2) The likelihood of success on appeal is shrouded in doubt. While there is much to be said for the concept that the House of Representatives, as an important component of one of the three elements comprising our Government, should have great flexibility and freedom in deciding whether, and, if so, to what extent, its files and the documents comprising them should be privileged and hence exempt from production, examination and copying, nevertheless recent events have indicated that absolute control in such matters is not to be accorded to one of the branches, the executive, the legislative or the judicial, in dispute with another. The history of efforts by Congress

to obtain assertedly privileged records from officials in the executive branch and by the judiciary to subpoena materials from the President of the United States, *see United States* v. *Nixon*, 418 U.S. 683, 706 (1974), demonstrates that the concept of separation of powers affords no complete answer, simply because the search for truth, requiring ready access to relevant or potentially relevant evidence, remains the cornerstone of our jurisprudence.[2] *See also*, D. Kaye, *Congressional Papers and Judicial Subpoenas*, 23 UCLA Law Rev. 57 (1975).

The district judge has evidenced, by his orders of June 24, 1983 and July 9, 1983, a conviction that the requisite balancing leads to a determination that the materials should be produced. Consequently, at the early appellate stage at which we now find ourselves, we are of the opinion that the plaintiff and the defendant each finds himself possessed of a substantial hope of success, which cannot, as against each other, be quantified until searching examination of the record connected with the hearing of the appeal itself has been completed. Each side has a reasonable, even substantial chance to win, and, consequently, each has a reasonable, even substantial chance to lose.

3) In terms of inconvenience and irreparability of injury, the scales weigh heavily in favor of the defendant. His superiors, comprising the House of Representatives, may have lost, with no opportunity to recapture, the confidentiality of the files and records if we deny the stay. Yet, on the other hand, if the stay is granted only a delay of at most a few months is to be predicted. While delay may sometimes amount to denial where justice is con-

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[2] To the extent that a determination such as that made in the instant case by the House of Representatives is deemed equivalent to the kind of decision that judges are required, as an everyday matter, to make, we note that a widespread concern must exist for the capacity of the House to achieve impartiality in the circumstances of the *Benford* litigation. The individual staff employees of Congress who are defendants have, and presumably have exercised, powers of access to House members not available to the plaintiff.

cerned, we do not perceive that to be the case here, in a case filed at some time prior to December 27, 1979 and so already more than three years of age. The stay, as we perceive matters, will occasion little harm to the plaintiff.

4) From the point of view of the public interest, clearly, it seems to us, the important question of the extent to which the documents here involved are privileged, when the House of Representatives has expressed its belief that the welfare of the country, *i.e.*, of the citizenry at large demands confidentiality, is an important one. It can only be answered if the stay is granted, for otherwise, presumably, the documents would be released to the plaintiff, and to that extent the question would become moot.[3]

5) Accordingly, consistent with the teachings of *Long* v. *Robinson*, 432 F. 2d 977 (4th Cir. 1970) and other cases addressing the considerations underlying a grant or a refusal of a stay pending appeal, we hereby order that the

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[3] In this connection, we are not unmindful of the possibility that the Clerk of the House of Representatives, responsive to the urging of his superiors, might continue to disregard a legal order, possibly even beyond the date, should it ever arrive, when the order of June 24, 1983 is affirmed, in whole or in part, on appeal. However, such an attack on a fundamental premise of civilized life, namely, that court orders are to be respected, is not assumed by us insofar as someone is concerned who has scrupulously to date abided by the rules, especially in making the application for a stay in the district court and again on appeal. The strain implicit in that assumption on the orderly conduct of governmental affairs is simply too great for us to make it or to allow it to affect our attempts to achieve a principled result.

order of the district court dated June 24, 1983 be and it hereby is stayed until further order of the Court.[4]

6) We further order that the stay shall apply to the order of June 24, 1983 only in its enforcement, and not in its accumulation guise. In other words, in the event the order should be finally affirmed on appeal we do not intend to be met with a contention that the stay of the order led to abrogation of the $500 per day civil contempt penalty, either *ab initio* and in its entirety or from and after the day of the entry of the stay.

7) The circumstances call for prompt resolution of the appeal. Accordingly, we further order that the appeal be expedited for hearing in accordance with such schedule as to exchange of briefs and date of argument as the Clerk of the Court shall establish.

With the concurrence of Judge Murnaghan.

DONALD S. RUSSELL,
United States Circuit Judge.

AUGUST 17, 1983.

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[4] We do not simply call for the order to regain its vitality automatically should the result of the appeal indicate that it is valid and enforceable. First, we perceive the possibility of revision in one or more respects of the order, even assuming that in large part it should persevere unscathed. Second, we anticipate that, in the event of a decision unfavorable to the Clerk of the House there will be an effort made to achieve review by certiorari by the Supreme Court of the United States. It simply seems inefficient to have an order automatically rearise when there will inevitably be uncertainty as to the status of things at the time the appeal is decided. Of course, nothing will preclude immediate application by Benford, if the outcome of the appeal warrants it, for resurrection of the order of June 24, 1983, in whole or in part.

No. 82-2145

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

DAVID L. HOLTON, *et al.*,
Petitioners

v.

GEORGE H. BENFORD,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

WILSON K. BARNES, ESQ.
W.R. Grace Building
Suite 1212
10 East Baltimore Street
Baltimore, Maryland 21202

DEAN E. SHARP, ESQ.
Suite 400
1300 Nineteenth Street, N.W.
Washington, D.C. 20036

GEORGE B. DRIESEN *
Suite 204
1000 Potomac Street, N.W.
Washington, D.C. 20007
(202) 338-5754

Counsel for Respondent
George H. Benford

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether a public employee is entitled to an immediate appeal from the denial of a motion for summary judgment based upon a claim of qualified immunity.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

A. The Proceedings Below

The proceedings below arise out of respondent's suit for damages against certain congressional "employees".[1] Those employees conspired with the American Broadcasting Company ("ABC") surreptitiously to videotape and broadcast a sales meeting among plaintiff, the manager of an insurance agency, and three petitioners who posed as insurance prospects. The fourth petitioner, defendant Kathleen Gardner-Cravedi, had previously assumed a false identity and thereby obtained employment as a sales

[1] At their depositions, Petitioners Holton and Gardner-Cravedi refused on grounds of privilege to divulge the terms of their employment or the scope of their duties. Petitioners Hamburger and Teitelbaum, the record indicates, were "volunteer" members of the Staff of the Select Committee on Aging.

trainee with plaintiff's insurance agency. Having gained plaintiff's confidence, she induced him to attempt to make the sale. He, of course, knew neither the identity of the meeting participants nor that ABC cameras were recording the transaction for a subsequent broadcast. See *Benford v. ABC*, 502 F. Supp. 1148 (D. Md. 1980), *aff'd by unpublished order*, 661 F.2d 917 (4th Cir.) [table], *cert. denied sub nom. Holton v. Benford*, 454 U.S. 1060 (1981). After ABC televised an excerpt from the meeting and an explanation of how it was arranged, plaintiff sued.

In April, 1980, petitioners filed a motion to dismiss on the ground that the Speech or Debate Clause immunized them from liability for their conduct and that, in any event, their status as federal employees dictated dismissal of the action. The district court denied the claim of Speech or Debate Clause immunity. It held, in reliance upon this Court's decisions in *Hutchinson v. Proxmire*, 443 U.S. 111 (1979) and *Gravel v. United States*, 408 U.S. 606 (1972), that the Speech or Debate Clause does not shield efforts to disseminate information outside the halls of Congress. *Benford v. ABC*, *supra*, 502 F. Supp. at 1153-1156. The court held further that the Speech or Debate Clause would not immunize defendant's conduct if, as alleged, that conduct was illegal. 502 F. Supp. at 1155. Finally, the court ruled, defendants would be entitled to a defense of qualified immunity if they made a "proper showing" that the taping and broadcasting in suit were authorized. 502 F. Supp. 1159. Petitioners appealed, and sought certiorari from the fourth circuit's *per curiam* affirmance, 661 F.2d 917 of the district court's order.[2] This Court declined to issue the writ.

After this Court decided *Harlow v. Fitzgerald*, 102 S.Ct. 2727 (1982), the district court *sua sponte* requested

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[2] The court of appeals' unpublished memorandum affirming the district court is printed as an appendix to the *certiorari* petition in *Holton v. Benford*, No. 81-452 (October Term, 1981).

the parties to address the impact of that case upon this one. Pending resolution of that question, the district court restored the stay of discovery against petitioners that had been substantially in effect during virtually the entire course of the litigation.

B. The Decisions Below

1. *The District Court*

After extended deliberation, the district court denied petitioners' motion for summary judgment on two grounds. First, the court held that defendant had produced ". . . no record evidence to indicate any individual member of Congress or staff member of the Select Committee possesses the actual power to arrange and/or authorize the public broadcasting of the November 3, 1978 [sales] meeting. Nor is this Court aware of a House resolution or Court order which granted the Congressional defendants power to broadcast with ABC, the plaintiff's November 3, 1978 meeting." (Pet. 23B). Second, the court held that both Title III of the Omnibus Crime Control and Safe Streets Act and the Maryland Wiretapping and Electronic Surveillance Act accorded plaintiff "clearly established" rights that defendants could not violate with impunity despite their status as public employees. (See Pet. 10B-13B, 16B-20B).[3] The court noted in passing, however, that ". . . if the congressional defendants [had] acted within the scope of their authority, . . ." they would have been entitled to judgment on the common law counts alleged in the complaint. (Pet. 20B). That result, the district court held, flowed from this Court's decision in *Harlow v. Fitzgerald, supra.* (Pet. 15B, 20B). Accordingly, the court denied the motion for summary judgment

[3] The statutes petitioners allegedly violated are cited and quoted *verbatim* in the district court's opinion at Pet. 10B-11B and 16B-18B. Both statutes generally prohibit electronic recording and disclosure of oral communications without the consent of the parties except in narrowly defined circumstances not present here.

and authorized respondent to begin the discovery that had been denied to him almost from the outset of the litigation.

2. *The Court Of Appeals*

Petitioners appealed, and respondent moved to dismiss the appeal as interlocutory. By *per curiam* order, the court of appeals granted the motion. In an unpublished Memorandum Opinion,[4] the court explained that "Finality as a condition to appellate review was written into the first Judiciary Act. . . ." and has been departed from only when its observance would practically defeat the right to any review at all." (Pet. 4A, quoting *Cobbledick v. United States*, 309 U.S. 323, 324 (1940). Here the denial of summary judgment did not ". . . finally determine []. . . ." whether petitioners' claim of immunity would ultimately be sustained, the court held. The claim could therefore be reviewed if and when respondent obtained a final judgment against petitioners. (Pet. 7A, 9A). In addition, the "degree" of petitioners' immunity, *i.e.*, the applicable legal standard, was settled in *Harlow, supra.* (Pet. 7A). Consequently, petitioners did not satisfy the exception to the finality requirement for the "small class" of decisions presenting "serious and unsettled", "important" questions of law raised in a context so independent of the merits as to escape review if the court strictly applied the statutory prohibition upon non-final appeals. (Pet. 5A, 7A). Nor did petitioners base their claim to summary judgment upon an express constitutional provision, the only remaining circumstance justifying a non-statutory, interlocutory appeal. (Pet. 9A). The court of appeals declined to read *Harlow v. Fitzgerald, supra*, as granting millions of public employees the right automatically to appeal denials of inter-

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[4] Rule 18(a) of the Fourth Circuit's Rules lists criteria that must be met before an opinion *may* be published. Compare Pet., p. 8. The remainder of the Rule specifies the consequences of a determination not to publish an opinion. See *infra*, p. 10.

locutory motions for summary judgment based upon claims of qualified immunity, given their ability to present facts at trial that might sustain the defense. Accordingly, the circuit court dismissed petitioners' appeal from the district court's order.

REASONS FOR DENYING THE WRIT

A. The Decision Below Is In Accord With Controlling Decisions Of This Court

This Court has repeatedly held that:

> The general principle of federal appellate jurisdiction, derived from the common law and enacted by the First Congress, requires that review of *nisi prius* proceedings await their termination by final judgment. First Judiciary Act, §§ 21, 22, 25, 1 Stat. 73, 83, 84, 85 (1789); see *McLish v. Roff*, 141 U.S. 661. This insistence on finality and prohibition of piecemeal review discourage undue litigiousness and leaden-footed administration of justice, particularly damaging to the conduct of criminal cases. See *Cobbledick v. United States*, 309 U.S. 323, 324-326. (*DiBella v. United States*, 369 U.S. 121, 124 (1962)).

Accord, Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 373-374 (1981) (citing other civil cases). In "a small class" of cases, *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 546 (1949), this Court has authorized a departure from the ". . . firm congressional policy against interlocutory or 'piecemeal' appeals. . . ." *Abney v. United States*, 431 U.S. 651, 656 (1977). But this case does not come within that class. First, the order below does not " '. . . resolve an important issue completely separate from the merits of the action. . . .' " *Firestone, op. cit., supra*, 449 U.S. at 375, *quoting Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). See also, *Parr v. United States*, 351 U.S. 513, 519 (1956); *United*

States v. McDonald, 435 U.S. 850, 859 (1977). On the contrary, whether petitioners are immune from suit on the facts here is an affirmative defense that ". . . goes to the very heart of the issues to be resolved at the upcoming trial." *Abney, op. cit., supra*, 431 U.S. at 663. (Challenge to sufficiency of indictment not reviewable.)

Second, petitioners' immunity claim can ". . . effectively be reviewed following judgment on the merits." *Firestone, op. cit., supra*, 449 U.S. at 377, since petitioners may proffer evidence and proposed jury instructions to establish their defense at trial, thus preserving the issue for appeal should the jury find for plaintiff. Yet, "only in the limited class of cases where denial of immediate review would render impossible any review whatsoever of an individual's claims have we allowed exceptions to this principle." *United States v. Ryan*, 402 U.S. 530, 533 (1971), *quoted as authoritative in Firestone, op. cit., supra*, 449 U.S. at 376. Third, the claimed immunity is not ". . . a right which would be 'lost probably irreparably' if review had to await final judgment . . ." *Abney v. United States*, 431 U.S. 651, 658 (1977). Compare *Stack v. Boyle*, 342 U.S. 1, 6 (1981) with *United States v. McDonald*, 435 U.S. 850, 856 (1978). Most important, the order denying summary judgment fails to satisfy the "threshold requirement of a fully consummated decision. . . ." *Id.* at 859 (citation omitted). *Accord, Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978). For, however vigorously petitioners may dispute the circuit court's reading of the district court's decision (Pet. pp. 7-8, 12), the fourth circuit's view that petitioners may revive their immunity claims at trial is now the law of this case. See *Insurance Group Committee v. Denver & R.G.W.R. Co.*, 329 U.S. 607, 612 (1947); 5 Am. Jur. 2d *Appeal and Error* § 744 (1962). Furthermore, a party is not entitled to summary judgment unless, ". . . viewed in the light most favorable to the opposing party," movant's evidentiary materials show that he is entitled to judgment as a matter of law. *Adickes v. Kress & Co.*,

398 U.S. 144, 157 (1970). A trial defendant will prevail unless plaintiff proves his case by a preponderance of the evidence. Given the difference in those standards, it is hardly surprising that a *denial* of summary judgment is *not* an appealable order. *Freeman v. Kohl & Vick Machine Works*, 673 F.2d 196, 200 (7th Cir. 1982), *following Pacific U. Conference v. Marshall*, 434 U.S. 1305 (1977); *United States v. Florian*, 312 U.S. 656 (1941). Thus, the decision below followed controlling decisions of this Court. Certiorari should be denied.

B. The Court Below Properly Dismissed Petitioners' Appeal Because The District Court Did Not Decide A "Serious And Unsettled Question Of Law"

Nixon v. Fitzgerald, 102 S.Ct. 2690 (1982) teaches that a pre-judgment appeal should be dismissed unless, in addition to satisfying the other criteria set out above, the challenged order "'. . . present[s] a serious and unsettled question.'" *Nixon v. Fitzgerald*, 102 S.Ct. 2690, 2698 (1982), *quoting and explaining Cohen v. Beneficial Loan Corp.*, 337 U.S. 541 (1947). The court below correctly found that petitioners' appeal did not present such a question (Pet. 8A-9A). In *Nixon*, *supra*, this Court held appealable a decision that the President of the United States was amenable to suit, thus confronting "a threatened breach of essential Presidential prerogatives under the separation of powers doctrine. . ." *Nixon v. Fitzgerald*, 102 S.Ct. 2690, 2698 (1982). In *Harlow v. Fitzgerald*, 102 S.Ct. 2727 (1982), the Court held appealable a similar decision that "seven White House aides" who also claimed absolute immunity could be sued. *Harlow*, *supra*, 102 S.Ct. at 2732, n.11.[5] Clearly, the trial court's orders in those cases decided "'serious and unsettled' question[s]" 102 S.Ct. at 2698. The President and his "senior aides and advisors" are critical to the functioning of the Government. Whether they may be

[5] In *Harlow*, this Court held that "the discussion in *Nixon* establishes our jurisdiction in this case as well. . . ." *Id.*

sued presents a question so important that an erroneous district court determination of that point of law must be promptly reversed.

The district court order here presented no such question. The order merely preliminarily denied the immunity claims of *temporary* Congressional employees and minor functionaries of a House "Select Committee", and applied settled law to particular facts.[6] Equally important, the district court's decision rested upon determinations that petitioners had produced no evidence that they or the Select Committee were authorized to engage in the conduct in suit and that petititioners reasonably lacked knowledge of the statutory prohibitions on electronic eavesdropping. (Pet. 9B-13B, 20B, 24B. See also *id.* at 6A.) Those determinations are factual and if reviewed would not establish meaningful principles to be applied in future cases. A ruling that such factual determinations are immediately appealable would ". . . open[] the way for a flood of appeals concerning the propriety of a district court's ruling on the facts of a particular suit." *Weight Watchers of Philadelphia, Inc. v. Weight Watchers Int'l, Inc.*, 455 F.2d 770, 773 (2d Cir. 1972). See *Firestone Tire & Rubber Co., supra*, 449 U.S. 368, 378-379; *Donlon Ind., Inc. v. Forte*, 402 F.2d 935, 937 (2d Cir. 1968). That consideration weighs heavily here because the official immunity defendants claim may also be claimed by some 16,000,000 federal, state, and local employees should they be sued for misconduct allegedly arising out of their employment. United States Department of Labor, Bureau of Labor Statistics, Employment and Earnings, Feb., 1983.[7]

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[6] *Harlow* establishes the substantive law and the procedure to be applied in adjudicating the immunity claims of public employees like petitioners who are not entitled to absolute immunity. 102 S.Ct. 2727, 2738-2740.

[7] The cited publication reports that in November, 1982 federal civilian employment totalled 2,726,000 and state and local employ-

The decision below does not conflict with *Harlow v. Fitzgerald*, 102 Sup. Ct. 2727 (1982), as petitioners contend. (Pet. p. 12). Since the *Harlow* petitioners claimed *absolute* immunity, *Harlow* could not possibly have held that denials of qualified immunity are immediately appealable. Nor does *Harlow* imply that they are. To minimize the disruptive impact of "insubstantial claims," *Harlow* modified the elements of the qualified immunity defense, and precluded discovery pending an initial ruling on summary judgment. 102 Sup. Ct. 2739. If, despite these advantages, a defendant is unable to persuade a learned trial judge that defendant is immune, plaintiff's claim can no longer be deemed "insubstantial." Hence, the concern underlying *Harlow*'s special protections for public employees does not argue for automatic appeals. Moreover, this Court apparently contemplated that immunity claims presented on summary judgment would be "appropriately determine[d] by the trial judge." *Id.* Had this Court thought otherwise, it would have remanded *Harlow* to the court of appeals rather than to the district court.

An occasional erroneous denial of immunity to low level government employees like petitioners presents no occasion for the extraordinary judicial concern that makes some absolute immunity denials appealable. See *Forsyth v. Kleindienst*, 599 F.2d 1203 (3d Cir. 1979). *Accord*, *Forsyth v. Kleindienst*, 700 F.2d 104, 106 (1983) (Sloviter, J., dissenting from referral of motion to dismiss to merits panel).[8] The *Nixon* rule limiting interlocutory appeals from denials of *absolute* immunity claims

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ment 13,256,000. The official immunity doctrine announced in *Harlow v. Fitzgerald*, 102 S.Ct. 2727 (1982) applies to state and local employees. See *id.*, 102 S.Ct. at 2737, 2738 citing and following *inter alia Wood v. Strickland*, 420 U.S. 308 (1975) and *Procunier v. Navarette*, 434 U.S. 555 (1978). *See also* 102 S.Ct. 2738, n. 30.

[8] Where federal trial courts err, defendants may seek certification and permission to appeal. 28 U.S.C. § 1292(b). In light of the rules laid down in *Harlow*, that protection suffices.

thus dictated the circuit court's dismissal of petitioners' appeal from a denial of their claims to *qualified* immunity.

C. Even If The Question Presented Were Important Certiorari Would Be Inappropriate Here

Even if the question presented were certworthy, the apparent conflict between the decision of the court below and *McSurely v. McClellan*, 697 F.2d 309 (D.C. Cir. 1982) would not warrant review of the fourth circuit's decision. That court determined not to publish its opinion. Hence, the court distributed it only to counsel and the court clerk. Rules of the United States Court of Appeals for the Fourth Circuit, Rule 18 (c)(ii). Unpublished opinions bind neither the district courts in the fourth circuit nor the court of appeals. *Hupman v. Cook*, 640 F.2d 497, 501, n.7 (4th Cir. 1981); *King v. Blankenship*, 636 F.2d 70, 72 (4th Cir. 1980). Thus, the decision below does not establish a meaningful conflict between the circuits. Were this Court to treat unpublished opinions like the one below as certworthy, moreover, the number of frivolous certiorari petitions would surely increase since counsel would no longer be deterred from seeking review here by the court of appeals' determinations to treat matters summarily.

Cases in other circuits indicate that the time is not yet ripe for this Court to decide the question presented. The third circuit is currently considering the question whether an order denying qualified immunity is immediately appealable. *Forsyth v. Kleindienst*, 700 F.2d 104 (3d Cir. 1983). The eighth circuit, in a decision rendered on June 30, 1983, has declined to follow *McSurely*'s broad reading of *Nixon* and *Harlow*. That court has held that only where the facts are undisputed and the issue is solely one of law will an order denying absolute or qualified immunity be deemed appealable. *Evans v. Dillahunty*, No. 82-2362, decided June 30, 1983. Neither opinion sug-

gests that the officials claiming immunity had failed to produce evidence that their conduct was authorized. Either of these cases would present more satisfactory vehicles than the decision below for settling the issue. Indeed, we submit, since the lower courts have just begun to grapple with the question what circumstances justify entertaining interlocutory appeals from denials of summary judgment to government employees claiming qualified immunity, prudence suggests that this Court await ". . . a concensus or a satisfactory majority view among the lower courts" before bringing the question here. Stern & Gressman, Supreme Court Practice, 269, n.32 (1978).[9]

Simple justice points in the same direction. Petitioners have already had one round of appeal and certiorari on their immunity claims. *Benford v. ABC*, *supra*, p. 2. In effect, they now seek another. The established law prohibiting review of all but a handful of non-final trial court decisions exists to block ". . . the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise. . . ." *Firestone Tire & Rubber Co. v. Risjord*, *supra*, 449 U.S. 368, 374, *quoting Cobbledick v. United States*, 309 U.S. 323, 325 (1940). The finality rule also ". . . emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of a trial." *Firestone*, *op. cit.*, *supra*. Those values have already been severely offended by petitioners' "piecemeal" approach to this litigation. For that reason, even if the

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[9] Petitioners' unsupported assertion that the District of Columbia and Fourth Circuits ". . . have jurisdiction over the two geographic areas containing the heaviest concentration of government officials in the nation." (Pet. p. 14) probably reflects their inadvertent failure to recognize that state and local employees far outnumber federal. See note 7, *supra*.

question presented should be resolved by this Court, we respectfully submit that the *per curiam*, unpublished decision below presents an inappropriate vehicle.

The contempt finding issued against the Clerk of the House hardly warrants granting certiorari here. That order is appealable, and the Clerk, represented by the same counsel as petitioners, has appealed. *Alexander v. United States*, 201 U.S. 117 (1906); *United States v. Ryan*, 402 U.S. 530, 533 (1971). If, as appears, petitioners contend that the subsequent discovery controversy demonstrates that they should have been granted immunity, the argument proves too much: any suit against a government employee can lead to conflicts over what documents a public authority may withhold. The implication—that government employees should be immune from suit in order to protect the government's files—is foreclosed by *Harlow v. Fitzgerald*, *supra*. And if petitioners mean to suggest that the issues in the contempt proceeding somhow bear on this one, we are confident that this Court will not be persuaded.[10] Petitioners' curious argument implies their recognition that, given the circumstances, this Court should deny certiorari.

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[10] Since petitioners have not clearly articulated their position, we cannot satisfactorily rebut it. But since they appear to rely upon the contempt order, we have printed most of the lower court's opinion as an Appendix to this Opposition so that the Court may see for itself that the later order has no bearing on the issues tendered. We are confident that this Court will not assume that the fourth circuit will not properly resolve whatever issues are presented on appeal from the contempt citation. In any event, those issues could not be reached even if certiorari were granted here.

CONCLUSION

For the reasons set out above, we respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

WILSON K. BARNES, ESQ.
W.R. Grace Building
Suite 1212
10 East Baltimore Street
Baltimore, Maryland 21202
(301) 685-4400

DEAN E. SHARP, ESQ.
Suite 400
1300 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 628-0671

GEORGE B. DRIESEN, ESQ.*
Suite 204
1000 Potomac Street, N.W.
Washington, D.C. 20007
(202) 338-5754

Counsel for Respondent
George H. Benford

* Counsel of Record

APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. N-79-2386

GEORGE H. BENFORD

v.

AMERICAN BROADCASTING COMPANIES, INC., and MRS. ISAAC (BETTY) HAMBURGER, MISS KATHLEEN T. GARDNER, MRS. LILLIAN M. TEITELBAUM, DAVID L. HOLTON and MARGARET OSMER

Filed June 24, 1983

Wilson K. Barnes, and Little, Hall, & Steinmann, P.A., of Baltimore, Maryland; Dean E. Sharp, of Washington, D.C., and George B. Driesen, of New York, for plaintiff.

Stanley M. Brand, Steven R. Ross and Michael L. Murray, Office of the Clerk, United States House of Representatives, of Washington, D.C., for respondent, the Clerk of the United States House of Representatives, Benjamin J. Guthrie.

Northrop, Senior Judge.

Presently before the Court is the plaintiff's motion requesting that this Court hold Benjamin J. Guthrie, Clerk of the United States House of Representatives in contempt of court for failure to comply with a subpoena *duces tecum.*

* * * *

On March 22, 1982, shortly before the Supreme Court's decision in *Harlow v. Fitzgerald*, the plaintiff caused a *subpoena duces tecum* to be issued and served upon Mr. Guthrie's predecessor in office, Benjamin L. Henshaw, Jr. It demanded that as a non-party witness, he or his authorized representative produce certain documents rele-

vant to this case. Counsel for Mr. Henshaw, the same counsel who represent the congressional defendants, filed a motion to quash on his behalf, arguing that this Court lacked jurisdiction to issue the subpoena at the United States Capitol. This Court's decision was stayed pending review of the above-mentioned *Harlow v. Fitzgerald* motions, and on January 26, 1983, the motion to quash was denied. The Clerk was ordered to arrange a time before April 30, 1983, for plaintiff's counsel to inspect certain of the documents described in the subpoena. *See Benford v. American Broadcasting Companies*, Civil No. 79-2386 (D.Md. Jan. 28, 1983).[1] In response to that order, Congressional counsel advised this Court "that we are reserving the right to enter and interpose timely objections to production to specific or general categories of documents in a timely fashion . . ." (Transcript of proceedings of January 26, 1983, pages 32, lines 13-16).

On February 25, 1983, the Select Committee on Aging of the United States House of Representatives filed a motion to intervene to obtain a protective order from the subpoena *duces tecum*. Counsel for the Select Committee, the same counsel who represent the Clerk and the congressional defendants, appeared on the Select Committee's behalf. They generally contended that the subpoena requested documents protected by the Speech or Debate Clause of the United States Constitution, and that the Select Committee's intervention was necessary to raise this defense. On April 26, 1983, for the reasons fully set forth in *Benford v. American Broadcasting Companies, Inc.*, Civil No. 79-2386 (D.Md. May 2, 1983), the Select

[1] Each document ordered to be produced was described in or pertained to the veracity of the affidavits of the Select Committee Chairman, Claude Pepper (D. Fla.), and of defendant Holton, the Select Committee's Chief Investigator, which were submitted in support of the congressional defendants' Harlow v. Fitzgerald motions. These documents were not "attached thereto" as is required by FED. R. CIV. P. 56(e), and are still of potential relevance to, among other things, the congressional defendants' immunity claims.

Committee's motion to intervene was denied. This Court suggested that the Clerk, and not the Select Committee, should raise these Speech or Debate Clause claims. The Court further described exactly what kind of format was acceptable. It was suggested that the Clerk submit to the Court a detailed index and description of the documents and portions of documents alleged to be beyond review, and a statement of the reasons therefor. At a minimum, the documents would then be reviewed *in camera*. It was made vividly clear that such a motion would be entertained even though April 30 had passed. *Cf. Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974).

Nevertheless, the Clerk failed to act, apparently in deference to a resolution passed by the United States House of Representatives on April 28, 1983, two days after the hearing and four days prior to the release of this Court's written opinion. The resolution reads, in part, as follows:

> *Resolved*, That the House considers the subpoena an unwarranted and unconstitutional invasion of its constitutional prerogative to determine which of its proceedings shall be made public, and in direct contravention of the constitutional protection for congressional investigative activity; and be it further *Resolved*, That the Clerk of the House be, and hereby is ordered and directed not to produce for inspection and copying by plaintiff or any of his representatives, or to the court for inspection, any of the investigative records of the select committee sought by the subpoena . . . H.R. 176, 98th Cong., 1st Sess., 129 Cong. Rec. 56, 2450-2457 (1983).

The plaintiff then filed the instant motion. Now this Court faces the distasteful task of having to decide whether the Clerk of the United States House of Representatives should be held in contempt of Court.

DISCUSSION

There is no question that this Court possesses the inherent power to enforce compliance with its lawful orders through civil contempt. *Shillitani v. United States*, 384 U.S. 364, 370, 86 S.Ct. 1531, 1535, 16 L.Ed.2d 622 (1966). Civil contempt occurs when it has been proven by clear and convincing evidence that a person refused to do what he was ordered to do. *Gompers v. Bucks Stove and Range Co.*, 221 U.S. 418, 449, 31 S.Ct. 492, 501, 55 L.Ed. 797 (1981); *In Re Irving*, 600 F.2d 1027, 1037 (2d Cir.), *cert. denied*, 444 U.S. 866, 100 S.Ct. 137, 62 L.Ed. 2d 89 (1979). The fact that the respondent in this case is the Clerk of the United States House of Representatives does not exempt him from this process. Indeed, FED. R. CIV. P. 45(b) explicitly provides that "any person" who disobeys an order of the court may be held in contempt. *Cf. United States v. Nixon*, 418 U.S. 683, 692, 94 S.Ct. 3090, 3099, 41 L.Ed.2d 1039 (1974) (where the Supreme Court inferred that this would include the President, but suggested that it was arguable he was an exception to the rule).

What is most unfortunate here is that the United States House of Representatives' resolution, referred to earlier, deliberately ordered the Clerk to disobey this Court. The House suggested *it* would determine which of the Select Committee documents, if any, could be reviewed by this Court or by the plaintiff.

I cannot help but express my deep and profound concern that any member of Congress would vote in favor of a resolution which would bar evidence from a court of the United States. Such a blanket assumption of power questions the very integrity of our constitutional structure and challenges the ruling of *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803). There, Chief Justice Marshall stated: "[i]t is emphatically the province and duty of the judicial department to say what the law is."

In the case now before the Court, it is the province and duty of this Court, and not the United States House of Representatives, to say what documents are and are not protected by the Speech or Debate Clause. Because the Clerk has chosen to honor this resolution, which was never reviewed by the House Committee on the Judiciary, this Court has not received the Clerk's Speech or Debate claims, and has not had an opportunity to determine if they have any merit. Had motions been filed by the Clerk, as outlined above, and this Court's warnings been heeded, this hearing would not have occurred.

Considering these facts, this Court has no choice but to hold Benjamin J. Guthrie, the Clerk of the United States House of Representatives, in contempt of this Court. For every day this contempt continues, the Clerk shall be fined $500.00.

I will, however, stay the imposition of the fine for six days to give the Clerk the opportunity to either appeal this decision, produce the documents, or to present to this Court his specific objections. In the event objections are filed, a detailed index of the documents held in his custody and described in the subpoena *duces tecum* should be provided, and each objection should be fully and specifically raised. This Court reserves the right to examine *in camera* any and all of these documents in order to assure their contents have been accurately characterized.

If this six-day period lapses, and the Clerk fails to properly appeal, produce, or object, the stay of the fine will be lifted. Of course any stay of the fine imposed will continue so long as a duly filed motion is under consideration or an appeal remains undecided.

The plaintiff's request for attorneys' fees will be considered once the Clerk purges himself of this contempt.

/s/ Edward S. Northrop
EDWARD S. NORTHROP
Senior United States
District Judge

Dated: 24 June 1983

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. N-79-2386

GEORGE H. BENFORD

v.

AMERICAN BROADCASTING COMPANIES, INC., and MRS. ISAAC (BETTY) HAMBURGER, MISS KATHLEEN T. GARDNER, MRS. LILLIAN M. TEITELBAUM, DAVID L. HOLTON and MARGARET OSMER

ORDER

In accordance with the foregoing Memorandum, and for the reasons stated in open court, IT IS, this 24th day of June, 1983, by the United States District Court for the District of Maryland,

ORDERED:

1. That the Clerk of the United States House of Representatives Benjamin J. Guthrie BE, and he hereby IS, held in contempt of court for failure to obey a *subpoena duces tecum* issued by this Court;

2. That the Clerk of the United States House of Representatives shall pay into the Registry of this Court a sum of $500 for every day this contempt continues; however,

(a) The imposition of this fine is stayed until July 8, 1983 to give the Clerk the opportunity to either appeal this decision, produce the documents requested, or file appropriate objections thereto;

(b) If this time period lapses, and the Clerk fails to properly appeal, produce, or object, the stay of the fine will be lifted;

(c) Any stay imposed will continue so long as a duly filed motion is under consideration or an appeal remains undecided, or the contempt is lifted by virtue of the Clerk's having purged himself of this contempt.

3. That the Clerk of this Court shall mail copies of the foregoing Memorandum and of this Order to counsel in this case.

/s/ Edward S. Northrop
EDWARD S. NORTHROP
Senior United States
District Judge